Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina Police Department, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD B. GLAZIER
Counsel of Record
REBECCA J. BRITTON
BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A.
230 Green Street
P.O. Box 2275
Fayetteville, NC 28302
(910) 323-4600

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

127 pp

QUESTIONS PRESENTED

I. Whether the Fourth Circuit erred in rigidly determining a right can be "clearly established" for § 1983 qualified immunity purposes only by reference to decisions of this Court, the Court of Appeals in which the case arose and the highest state court in which the case arose?

II. Whether the Fourth Circuit erred in holding a case on point must exist for § 1983 liability to attach in all circumstances, thereby creating the perverse probability the more egregious the misconduct, the more likely qualified immunity will inure because of a lack of similar blatant misbehavior and a dearth of cases on the subject?

III. Whether the Fourth Circuit erred in holding that, despite this Court's opinions in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), as of 1982, a criminal defendant did not possess a constitutional right under the Due Process Clause of the Fourteenth Amendment to have police disclose material, exculpatory evidence in their possession to the prosecutor?

IV. Whether the Fourth Circuit erred in holding that even if a constitutional right is clearly established at the time of the conduct in issue, if police officers did not know they could be held monetarily responsible for their violation, § 1983 liability can not attach?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lesly Jean, respectfully prays this Court grant a Writ of Certiorari to review the *en banc* judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on September 17, 1998.

OPINIONS BELOW

The September 17, 1998, *en banc* opinion of the United States Court of Appeals for the Fourth Circuit is reported at 155 F.3d 701 (4th Cir. 1998) and is reprinted in the Appendix (hereinafter "App.") hereto, p. 1.

The March 7, 1997, panel opinion of the United States Court of Appeals for the Fourth Circuit, reported at 107 F.3d 1111 (4th Cir. 1997) is reprinted at App. 43.

The October 13, 1995, opinion of the United States District Court for the Eastern District of North Carolina is reprinted at App. 66.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit (*en banc*) in this action issued on September 17, 1998. The jurisdiction of this Court to review the judgment of that court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution as well as 42 U.S.C. § 1983. The provisions of both the Amendment and Statute are set out in the Appendix hereto, App. 80.

STATEMENT OF THE CASE

A. THE FACTS

On July 21, 1982, at approximately 3:00 a.m., Kathleen Wilson (Wilson) was brutally raped and beaten at her home in the early morning. A police officer arrived, took a very brief description of the perpetrator and immediately broadcast it on the police radio. Wilson's description of her assailant was: a black male with a slight accent, wearing blue shorts and white tennis shoes. Patrolman Shingleton, a respondent in this case, heard the broadcast and stopped a man walking along the highway who fit the description. After a brief encounter, the man fled and was not found again. Shingleton described the man he had seen as a black male with a mustache, close cut hair, approximately five feet, ten inches tall, wearing blue shorts, a blue shirt with writing, white socks and white tennis shoes. App. 3, 45-46.

Meanwhile, Wilson was transported to the hospital for treatment and then to the police station to make a statement. She also worked with a sketch artist to create a likeness of the perpetrator. The description provided by Wilson did not match, in many respects, that provided by Shingleton. Specifically, Wilson described her attacker as

a black male, muscular, five feet, eight inches tall, weighing approximately one hundred sixty five or one hundred seventy pounds with a marine haircut, kinky hair, no facial hair and wearing dark shorts that were probably navy blue, white socks and high-top sneakers. She also indicated the rapist had small freckles widely scattered over his upper face and forehead as well as a large spot somewhere on his left cheek, slightly darker than the rest of his face and between the size of a dime and nickel. *Id.* at 3, 45-46.

In a subsequent interview of defendant Shingleton, a State agent assigned to the case determined Shingleton could not describe a single facial feature with any confidence and thought the suspect had a beard and maybe a mustache. No composite was taken from Shingleton's description due to the incomplete nature of his observations. *Id.*

The next day defendant Collins, then head of the Detective Division, decided to hypnotize Shingleton to enhance his memory of the encounter with the suspect on the street. Apparently both officers knew the content of Wilson's description and knew it differed from Shingleton's description, but it is unclear whether they both had also seen the Wilson composite sketch. *Id.* at 4. The hypnotic session was recorded on audio tape and its results were noted in a hypnosis information worksheet. Under hypnosis, Shingleton's memory of the possible suspect changed in multiple ways, not the least of which was the facial hair on the suspect's face and writing on his tee-shirt both disappeared, he recalled blue stripes on each of the person's socks and, whereas before he was unable to describe, with any clarity, the suspect's face, he

now described the person he had seen as someone with a "baby face" full cheeks, oval jaws, big lips, big nose and eyes that were glassy with dilated pupils as if he had been drinking. Following this hypnotic session, the only notes recorded in Collins' log were the description given by Shingleton now "matched the one given by Wilson". *Id.* at 4 and 46.

A few days after the attack, Chief of Police Roger Halbert was in a Dunkin' Donuts and noticed petitioner, a marine stationed at Camp Lejeune nearby.[1] Believing Jean resembled one of the descriptions, Halbert called Shingleton. Shingleton identified Jean as the man he had seen on the roadside. Jean was placed under arrest, interviewed and, after receiving his consent, his locker and laundry bag were searched at the marine base. A blue tee-shirt, a blue pair of shorts and pair of white sneakers were seized. Jean's shoes were white high-top basketball sneakers with the "Nike" brand name and logo in black, and black stripes on the side with black laces. His shorts were blue with a white border and three white stripes on either side. Socks were found, but they did not match the description. *Id.* at 4-5 and 46.

The following day, Detectives asked Wilson to come to the police station to view a photographic line-up that included Jean's photo. She stated none of the pictures were of her assailant, but one photo – not Jean's – made her uncomfortable. She was also shown the clothing

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[1] At the time of these events, Lesly Jean was a twenty-two year old, clean shaven black male weighing approximately one hundred fifty-two pounds, five feet, ten inches tall, with no freckles or remarkable spots on his face.

taken from petitioner's locker, but recognized nothing. *Id.* at 46-47.

The next day, Wilson telephoned detectives and asked to see the photographic line-up again. This time Wilson said Jean's eyes looked "haunty", but could not make any positive identification. *Id.* at 5.

At this point, Collins and Shingleton decided to hypnotize Wilson to enhance her ability to identify her perpetrator's photograph. Once again, the hypnosis was audio taped, but as with the case of Shingleton, the pre and post hypnotic conversations and descriptions were not. Collins again filled out worksheets prior to and after the hypnosis. *Id.* at 47.

Again, as with Shingleton, Wilson's hypnosis produced at least three new pieces of information: Wilson believed her attacker had an accent, possibly Puerto Rican, recalled his shorts were a solid dark color without any stripes and, finally, his shoes were white high-top Nike sneakers with white shoelaces. Wilson further indicated her assailant's eyes were gray and it looked like he had freckles.[2] *Id.* at 5.

In the weeks following the hypnosis, Wilson listened to voice exemplars and, after a week's delay and at least four play backs, tentatively selected two possible voices

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[2] As the panel opinion in this case makes clear, the "hypnosis itself was very suggestive, and during the procedure the officers effectively persuaded Wilson that Jean could have been her assailant." Nonetheless, the validity of the hypnotic procedure is itself not an issue in this case, only the exculpatory nature of the evidence obtained. *Id.* at 47 n.1.

as that of her assailant, including petitioner. After more play backs and delay, Wilson identified Jean's voice. She also picked Jean out of a three-person show-up. Jean was the only person in the show-up previously known to her through the photographic line-up.[3] *Id.* at 5-6, 47.

Subsequently, Jean was indicted in October of 1982 for rape and first degree sexual offense. Prior to trial, Jean's counsel filed a discovery motion requesting, *inter alia*, disclosure of "facts and circumstances" surrounding any pre-trial identification; inspection of recordings tangible to the preparation of his defense; and results and reports of any physical examinations, tests, measurements, and experiments made in connection with the case. Despite this motion, the state did not inform Jean's counsel the victim had ever seen Jean's photograph prior to the line-up, or that Wilson or Shingleton had ever been hypnotized. Moreover, the state failed to disclose any of the documentation of the hypnoses and how the descriptions had been changed by them. Not until the victim testified under direct examination during trial, did Jean's counsel learn of the hypnosis. Then, even after counsel specifically requested all records and recordings related to the procedures, the state failed to disclose the requested material, denying any existed. *Id.* at 47-48.

The State's trial evidence consisted of Jean's sneakers, shorts and tee-shirt, a blood test placing him in the same 32% of the population as the rapist and the identification testimony of Shingleton and Wilson. Wilson

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[3] "These two identification procedures were also highly suggestive and unreliable", but are not in issue. *Id.* at 47 n.2.

identified Jean with complete certainty. She repeatedly bolstered her identification by referring to a "freckle" she observed in close detail on her assailant and claimed it was identical to a small black mark on petitioner's face. She claimed to have described the mark to the detectives, but the jury was never informed she actually told the detective the assailant had many small freckles widely scattered over his upper face and forehead and the spot on her assailant's cheek was only slightly darker than the surrounding skin and larger than a dime.

Wilson also positively identified petitioner's shoes as that of her attacker, claiming to have seen the "Nike swirl" when raped. She testified she did not recall the color of the shoelaces nor whether the shorts had stripes, although she identified petitioner's shorts as the ones she had seen her attacker wearing. She testified even at the time of the attack, she thought the attacker had a New York or Puerto Rican accent and identified petitioner's voice as that of her assailant. Wilson denied the hypnosis had any effect on her memory and the detectives corroborated this by testifying "nothing new" had come out of the hypnosis.

Shingleton also positively identified petitioner in court. He identified petitioner's clothing as being similar to that of the suspect and offered a new detail of identification – that he recognized the "white trim" on the shorts. He could not remember the color of the shoelaces, but he identified the suspect's accent as "Jamaican".

Petitioner presented four alibi witnesses in defense in addition to his own testimony. Three marines testified they awakened plaintiff in his bunk or saw him there at

the exact time the victim was being assaulted. Jean's platoon commander testified petitioner was required to be on duty at that time and, if petitioner had not been present, there would have been a record of his absence, which there was not. Petitioner testified he was in his barracks at the time of the assault. On December 5, 1982, Jean was convicted on all counts and sentenced to two consecutive life terms. After his direct appeals and applications for state post conviction relief proved unsuccessful, Jean filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina. In *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991) (*per curiam*), the United States Court of Appeals for the Fourth Circuit unanimously reversed the decision of the District Court denying habeas relief and found the State's failure to turn over evidence relating to the hypnosis and other identification procedures violated *Brady v. Maryland*, 373 U.S. 83 (1963). That court further found the evidence at issue had certainly been material, as most of the non-identification evidence presented at trial tended to exculpate rather than implicate Jean. *Id.* at 48. *See also Jean v. Rice*, 945 F.2d at 87. On that basis, the Fourth Circuit vacated Jean's conviction and remanded for further proceedings. Upon remand, the State declined to try Jean again and he was released from incarceration after serving nine years in prison.

B. PROCEEDINGS IN THE COURTS BELOW

On May 20, 1994, Jean filed the present complaint against Collins and Shingleton in the United States District Court for the Eastern District of North Carolina,

alleging Fourth Amendment and Fourteenth Amendment Due Process Clause violations under 42 U.S.C. § 1983 and supplementary state-law claims. The Due Process claim specifically alleged a violation of Jean's right under *Brady v. Maryland*, *supra*, to have exculpatory evidence disclosed to the prosecution.[4] The state law claims were dismissed prior to summary judgment and are not at issue. The District Court subsequently granted Defendants' Motion for Summary Judgment on the § 1983 claim, holding, as a matter of law, defendants were entitled to qualified immunity because Jean's right to have the government disclose exculpatory evidence regarding the changes in identification obtained through hypnotically-enhanced testimony was not clearly established in 1982. App. 73.

A panel of the United States Court of Appeals for the Fourth Circuit unanimously reversed the decision of the District Court in *Jean v. Collins*, 107 F.3d 1111 (4th Cir. 1997), holding that as of 1982, respondents were "under a clearly defined constitutional duty to disclose [exculpatory impeachment] evidence relating to the hypnosis to Jean's counsel." App. 57

Upon *en banc* review, the United States Court of Appeals for the Fourth Circuit, in a 6-5 opinion, held respondents were protected by qualified immunity for

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[4] Petitioner's complaint was supported by affidavits of defense counsel and the prosecution, including statements the prosecution "was told by [ ] Collins that nothing was generated from the hypnosis", not informed of the existence of any recording, worksheets or data related to the hypnosis sessions and was told "the hypnosis did not materially increase [Wilson's] memory of the event and [ ] did not help identify Jean." App. 88 and 92-93.

their failure to turn over exculpatory evidence to the prosecutor in 1982. App. 3. Specifically, the majority opinion held: (1) in determining whether a right is "clearly established", courts should only review decisions of this Court, the Court of Appeals in which the case arose and the highest court of the state in which the case arose and, if there are no such decisions on point, the right cannot be deemed "clearly established"; (2) as of 1982, this Court had not held the police had such a constitutional duty; (3) as of 1982, no opinion of the Fourth Circuit had held such a duty existed; (4) even though police officers in 1982 "could reasonably have expected to be internally accountable to prosecutors for not turning over evidence in their possession", and a failure to turn over exculpatory evidence would violate *Brady v. Maryland, supra*, "officers had no earthly idea that they would be subject to a federal cause of action for money damages [since] no relevant decision had held that the police's responsibility to furnish evidence to the prosecution was governed by federal constitutional law", thus, respondents were entitled to qualified immunity; and (5) even though decisions existed in other circuits supporting petitioner's claim, those decisions were irrelevant for determining whether or not the constitutional right at issue was "clearly established" for officers in jurisdictions under control of the Fourth Circuit. App. 17-24.

Three dissenting opinions were filed, the gist of which is that based on decisions of this Court, including *Brady v. Maryland, supra* and *Giglio v. United States*, 405 U.S. 150 (1972), as well as decisions of the Fourth Circuit and other circuits, including, *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964), a reasonable

police officer in North Carolina would have known a criminal defendant had a clearly established right to have officers ministerially deliver material, exculpatory evidence to the prosecutor. Thus, the dissents argue, respondents' conduct was not entitled to qualified immunity.

This Petition for Certiorari was filed timely seeking review of the *en banc* decision of the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' qualified immunity standard bears no relation to the purposes behind the doctrine, is in direct conflict with this Court's opinions in *Anderson v. Creighton*, 483 U.S. 635 (1997) and *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219 (1997) as well as decisions in numerous Circuits, and application of that erroneous standard has resulted in a manifestly unjust result.

The basic purposes of qualified immunity are well understood. Government officials are protected by qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. at 638. The test of qualified immunity for police officers sued under 42 U.S.C. § 1983 is whether, in performing discretionary functions, they have engaged in conduct that violates "clearly established statutorily or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity is designed to shield government officials performing their duties from the burdens of trial and threats of monetary liability. *Id.*

Immunity can therefore be established either on the basis the right violated was not, at the time, "clearly established", or, even though the right was established and violated, it was one that a "reasonable person" in defendant's position could have failed to appreciate would be violated by his conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). Accordingly, ruling on a defense of qualified immunity requires three separate determinations:

1. Identification of the specific right allegedly violated;
2. Whether at the time of the alleged violation the right was clearly established; and
3. If so, whether a reasonable person in defendant's position would have known that doing what he did would violate that right.

The issue in this case focuses on whether or not at the time of Shingleton and Collins' actions in 1982, it was clearly established that a defendant's due process rights were violated when the police concealed material exculpatory evidence. In making this determination, the Fourth Circuit, sitting *en banc*, established and applied a standard at odds with the doctrinal premises of qualified immunity, one in direct conflict with this Court's opinions in *Anderson v. Creighton, supra*, and *United States v. Lanier, supra*, and numerous other Circuits. Indeed, as the three dissenting opinions exhaustively detail, the majority opinion "marks an unmistakable movement . . . to a rule of actually unqualified, though technically qualified, immunity for police officers", App. 27 and "makes a mockery of [this Court's] decision in *Anderson v. Creighton*, [*supra*]." App. 38. The Fourth Circuit's action

conflicts with opinions of this Court and other circuits on at least four separate grounds, each of which is addressed *seriatim* and each of which concerns issues of national import under § 1983. Specifically, the Fourth Circuit held:

1. In determining whether a right is "clearly established", courts should only review decisions of this Court, the Court of Appeals in which the case arose and the highest court of the state in which the case arose and, if there are no decisions on point, the right cannot be deemed "clearly established";

2. A § 1983 plaintiff must demonstrate a prior case has been decided, essentially on all fours with the case at bar, in order for § 1983 liability to attach;

3. As of 1982, a reasonable police officer would not have known he could be held constitutionally accountable for a failure to disclose exculpatory evidence to prosecutors in a criminal case; and

4. Even if a reasonable officer would have so known, he would not have known he could be held monetarily liable and, thus, is immune from damages.

A. The Fourth Circuit's opinion addresses a fundamental question applicable to every § 1983 claim by rigidly and erroneously defining what sources of law may be examined to assess whether a right is "clearly established" for § 1983 qualified immunity analysis in direct conflict with numerous circuits and dicta in several decisions of this Court.

A central dispute about immunity law exists nationwide in determining what sources of law may be examined to assess whether the right was clearly established. The Federal Courts of Appeal have taken different approaches to this question and this Court has never expressly addressed the matter in a case dealing directly with § 1983.

In some circuits, the courts have concluded relevant precedent from other jurisdictions may be examined to make this determination. For example, in *Soto v. Flores*, 103 F.3d 1056 (1st Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 71 (1997), the court held that a clearly established right may be found even where this Court and the circuit court in question have never specifically addressed the issue. Similarly, in *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996), the court found a right to be clearly established in the jurisdiction where that court had not ruled on the issue, notwithstanding a split on the issue in other circuits. Similarly, in *Doe v. State of Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994), the Fifth Circuit eschewed a rigid formula for identifying courts whose decisions would "clearly establish" constitutional rights.

Other circuits refer to a hierarchy of relevant case law in making the "clearly established" determination. *E.g.*,

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992) (Law is clearly established if there is Supreme Court or Tenth Circuit decision on point or the weight of authority from other circuits shows the law was clearly established); *Long v. Norris*, 929 F.2d 1111 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991). And, many courts take a less formalistic approach about what may be used as references for clearly established rights, generally looking to whatever decisional law is available in making the determination, including state court decisions and decisions from other circuits or district courts. *E.g., Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992). Only the Second Circuit seems ready to join the Fourth Circuit's *en banc* opinion at bar in holding that in the absence of Supreme Court or home circuit precedent establishing a particular right, the right cannot be deemed "clearly established". *See Russell v. Selsky*, 35 F.3d 55 (2nd Cir. 1994). Accordingly, even a cursory review of the circuits evidences a hopeless split on the issue of what sources of law may be considered in determining whether a right is clearly established. The Court must resolve this split.

In addition, not only is the Fourth Circuit's rigid, formalistic definition in conflict with numerous other circuits, it appears to be at odds with opinions of this Court that have spoken, at least in general terms, to the issue.

The requirement that a right be clearly established ensures officials have ample notice of the legal standards that govern their conduct. *See Davis v. Scherer*, 468 U.S. 183, 195 (1984). Consistent with this need for notice, the Court has required the right infringed be identified at a

high level of particularity. *Anderson v. Creighton*, 483 U.S. at 639. However, no opinion of this Court has ever held that in determining whether a right was clearly established, a court is bound to decisions of this Court or the circuit in question. Indeed, in *Anderson, supra*, the Court explicitly held a § 1983 plaintiff need not show that in a prior case the government officials' actions were held to be constitutionally unlawful. *Id.* at 640. More recently, the Court in *dicta* has likewise suggested the Fourth Circuit's extraordinarily narrow view is in error. *See United States v. Lanier, supra.*

Lanier involved a criminal prosecution brought under the criminal equivalent of § 1983: 18 U.S.C. § 242. This section makes it a federal crime for a person acting under color of state law to wilfully subject a person to the deprivation of federal rights. Federal prosecutors charged a state judge with equal protection violations for his sexual assault on several women with whom he was associated through his official position. Defendant argued the law governing public officials' sexual assaults was not clear. Specifically, defendant opined that due process requires an individual have "fair warning" about the unlawfulness of a particular type of conduct before he could be held liable under the criminal law. The Sixth Circuit accepted this claim and held a Supreme Court case must exist establishing sufficient notice about criminal responsibility in a "fundamentally similar" factual context. This Court rejected that doctrine and, drew by analogy, from qualified immunity law. It concluded that principles of "clearly established" law, under qualified immunity analysis were similar to defendant's concerns regarding "fair warning" in criminal cases:

> "Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, *without any need for a categorical rule that decisions of the Court of Appeals and other courts are inadequate as a matter of law to provide it. Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar' at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. . . .*

Lanier, 117 S.Ct. at 1226 (emphasis added).

Thus, since the opinion of the Fourth Circuit in this case is in conflict with the opinions of multiple other circuits, *dicta* from prior opinions of this Court and addresses a fundamental question applicable to every § 1983 claim in the nation, this Petition for Writ of Certiorari should be granted.

B. The Fourth Circuit's determination that a case on point must exist for liability to attach is incorrect as a matter of law.

As the dissenting opinions again make clear, the majority opinion boils down to the theme "No case on point!" (Hamilton, J., dissenting) App. 38. In multiple

citations throughout the majority opinion, the Fourth Circuit clearly requires a case on point for § 1983 liability to ever attach. This ruling is in direct conflict with opinions from multiple circuits, *dicta* from this Court and general common sense.

In the *United States v. Lanier*, 13 L.Ed.2d at 446, this Court stated that:

> "general statements of law are not inherently incapable of giving fair and clear warning, and in other instances, a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful'."

Furthermore, this Court explicitly stated in *Anderson v. Creighton*, 483 U.S. at 640, "the very action in question" need not have "previously been held unlawful"; rather, the standard to defeat qualified immunity is that "in light of pre-existing law, the unlawfulness must be apparent."

In line with this authority, numerous circuits have held it is not necessary there be a specific holding in order to find a constitutional rule has been "clearly established". *Durham v. Nu'Man*, 97 F.3d 862, 867 (6th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689 (1995); *Martin v. Board of County Commissioners of Pueblo County*, 909 F.2d 402, 407 (10th Cir. 1990). Indeed, if the Fourth Circuit's holding in this case remains law, qualified immunity would be converted into a nearly absolute barrier to recovering damages against an individual governmental actor with the

doctrine completely ripped from its moorings of fair notice.

As Judge Ervin's dissenting opinion details, the majority's analysis reveals a complete misunderstanding about the nature of qualified immunity. "A right does not become clearly established when a plaintiff successfully brings an action to enforce it under § 1983." App. 34. In the case at bar, as of 1982, decisions of this Court made explicit the duty of the government to disclose to a criminal defendant exculpatory evidence under the Due Process Clause of the Fourteenth Amendment. *Brady v. Maryland, supra; Giglio v. United States, supra.* Furthermore, from 1964 forward, decisions in the Fourth Circuit made clear a law enforcement officer in North Carolina would have known that a criminal defendant had a clearly established right to have officers deliver material, exculpatory evidence to prosecutors. *E.g., Barbee v. Warden, Maryland Penitentiary,* 331 F.2d 842, 846 (4th Cir. 1964). In the case at bar, it is beyond cavil that the identification of Jean by Wilson and Shingleton was the critical, indeed really the only, evidence against him. Major changes in the identification by both witnesses constituted patently exculpatory evidence. Any reasonable officer would have so understood and, given the extant authority from this Court and the Fourth Circuit, no officer could have deduced in 1982, consistent with the Constitution, that he could withhold changes in identification from the prosecution.

To allow defendants at bar to escape liability under the theory that no specific holding existed, as of 1982, under the exact fact pattern of this case, simply defies

common sense. *See Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994) (*en banc*) (Higginbotham, J. and Politz, J.; specially concurring) ("The error can be made in the opposite direction – a search so narrowed that legal nuance rises to uncertainty and ultimately confounds common sense."). Carried to its logical conclusion, the Fourth Circuit's opinion requires case law at a level of specificity far beyond what this Court has ever mandated. It creates the perverse possibility the more egregious and unthinkable the constitutional violation, the more likely the governmental actor is to escape liability. *Harlow* and its progeny were never intended for protection of so clearly and objectively wrongful conduct as in the case at bar. For liability to attach under § 1983, an official should not have to be told so explicitly that which he cannot so clearly do. A defendant in these circumstances should not be shielded from liability due to the fact a dearth of case law exists on all fours because few have ever attempted such egregious and unconstitutional misconduct.

C. The Fourth Circuit clearly erred in holding that, as of 1982, a criminal defendant did not possess a constitutional right to have the police turn over material, exculpatory evidence to the prosecution.

Again, as the dissenting opinions establish, as of 1963, when *Brady, supra* was decided, suppression of exculpatory evidence by the government, material to the outcome of a trial, violated due process irrespective of the motivation of the prosecutor. In addition to disclosure of

purely exculpatory evidence, since at least 1972, due process has also required the government disclose material evidence affecting the credibility of government witnesses, not the least of which is changes in basic identification testimony. *Giglio v. United States, supra.*

In the case at bar, however, it is not the prosecutor's decision to withhold exculpatory evidence that is at issue; rather it is the decision of the investigating police officers which is in question. Thus, the issue narrows to whether in 1982 a police officer's failure to disclose information to prosecutors, as derived from *Brady v. Maryland, supra,* was clearly established. Contrary to the Fourth Circuit's opinion, the answer to this question is patently yes.

In 1964, the Fourth Circuit decided the critical case of *Barbee v. Warden, Maryland Penitentiary, supra. Barbee* involved a habeas corpus proceeding in which petitioner was found guilty in a Maryland state court of assault with intent to kill and unauthorized use of an automobile. The defendant's revolver was offered for identification purposes and several witnesses made partial identifications of the weapon as one used in the shooting. However, reports of ballistics and fingerprint tests made by the police, which tended to show that a different revolver, not petitioner's, was used in the crime and, thus, tended to exculpate the defendant, were *not* disclosed to the prosecution by the police. The Fourth Circuit found the ballistics and fingerprint tests were relevant, exculpatory, should have been disclosed and ordered a Writ of Habeas Corpus issued.

One of the arguments raised by the State of Maryland in *Barbee* was that since the prosecuting attorney had no

knowledge of the existence of the report, there was no *Brady* violation. The Fourth Circuit's response to this argument answered directly the question raised by petitioner's complaint in this case:

> "Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. *Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint of the trial is no less if they, rather than the State's Attorney were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the Court and the defendant.* . . . The duty to disclose is that of the State, which ordinarily acts with a prosecuting attorney; but if he too is the victim of police suppression of material information, the State's failure is not on that account excused.

331 F.2d at 846 (emphasis added) (footnotes omitted). *See also McMillan v. Johnson*, 878 F. Supp. 1473, 1502 (M.D. Ala. 1995) ("Since *Brady* came down, however, it has been clear to every reasonable law enforcement officer that his or her conduct could impact greatly upon the constitutional rights articulated in *Brady*. Obviously, if law enforcement officials, who investigate cases and develop the evidence, do not turn exculpatory evidence over to

the prosecutor, the prosecutor is unable to properly perform his duties under *Brady*. The court holds, therefore, that [in the years at issue in *McMillan*], *Brady* had imposed a clearly established duty upon law enforcement officers to not intentionally withhold clearly exculpatory evidence from the prosecutor."); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988) (*Brady* established a law enforcement officer's duty not to deliberately conceal exculpatory evidence).

Furthermore, a host of other *pre-1982* cases hold that *Brady* and its progeny, including *Giglio*, affects not only the prosecutor, but also any other investigative agency or personnel of the government which are part of the case of the prosecution against the defendant. *See, e.g., Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973); *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975) (directly on point requiring investigative disclosure of hypnotically changed testimony).

In short, the Fourth Circuit's opinion is simply wrong. In 1982, the parameters of a law enforcement officer's constitutional duty to disclose exculpatory evidence to the prosecution was fixed and, by analogy to *Teague*, dictated by precedent. Indeed, although the Fourth Circuit discusses the need to make certain officials are not held responsible for sorting out conflicts in the law, it's opinion fails to cite any contrary authority even remotely suggesting that as of 1982, a reasonable officer would not have known a criminal defendant had a clearly

established right to have police deliver material, exculpatory evidence to prosecutors.[5]

In conclusion, *Brady*, *Giglio*, and *Barbee* directly control this case. As of 1982, the police were under a long-established duty to disclose exculpatory information to the prosecutor. Thus, a known constitutional violation occurred and, as found in *Jean v. Rice*, *supra*, *Brady* disclosure failed to occur due to respondents' concealment of patently exculpatory evidence. The Fourth Circuit's opinion to the contrary is incorrect as a matter of law and constitutes, in Judge Hamilton's words, "tomfoolery." App. 40.

D. The Fourth Circuit's ruling that even if a constitutional right were clearly established, if police officers did not know they could be held monetarily responsible for their violation of said rule, § 1983 liability cannot attach egregiously misreads this Court's prior precedents and must be reversed.

The Fourth Circuit's opinion clearly holds that even though an officer might have understood he had a constitutional duty, under *Brady*, *supra*, to turn over exculpatory evidence and that a failure to do so might jeopardize a conviction, because "the officers had no earthly idea

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[5] Indeed, prior to this case, several panel opinions of the Fourth Circuit had explicitly held police officers can be liable under § 1983 for the failure to disclose material exculpatory evidence. *See, e.g., Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996); *Carter v. Bunch*, 34 F.3d 257, 264 (4th Cir. 1992); *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *overruled in part by Albright v. Oliver*, 510 U.S. 266 (1994).

that they would be subjected to a federal cause of action for monetary damages", qualified immunity must ensue. As Judge Ervin's dissenting opinion cogently articulates, it "is irrelevant whether the officers would have been on notice in 1982 that a panel of this court had held other officers liable for a *Brady* violation under § 1983." App. 35. The question is not whether officers understood § 1983 liability might attach, but whether the underlying constitutional right was clearly established at the time the officers acted.

This bizarre portion of the Fourth Circuit's holding constitutes an egregious misstatement of the law and fundamentally alters the premise of qualified immunity under § 1983. Now, in this circuit, unless a specific monetary liability case exists on point, governmental actors will have an absolute shield of immunity for any constitutional violation, no matter how flagrant, long-standing or obvious. Indeed, carried to its logical conclusion, the opinion erects a bar of absolute immunity for police misconduct in most cases. This standard is in clear conflict with decisions of this Court announcing the purposes of qualified immunity and nearly every other circuit in the country. A Petition for Writ of Certiorari must issue to correct this fundamental flaw in the Fourth Circuit's qualified immunity analysis.

Finally, the Writ must issue to correct "the manifestly unfair" actions of respondents, which led to Petitioner's wrongful conviction and imprisonment for nine years. App. 27. As Judge Ervin eloquently stated, speaking for five members of the Fourth Circuit:

> "[T]he real scapegoat in this matter is Lesly Jean. Jean spent nine years in prison for a crime he did not commit because police officers used 'hypnosis' to alter the description of the perpetrator of this crime so that it matched Jean's appearance and his clothes. . . . [Respondents] are without doubt responsible for the mockery of justice that resulted in Jean's nine year confinement. As I have argued, the question before us is whether a reasonable police officer would have known in 1982 that concealing evidence from the prosecutor violated the constitutional rights of a criminal defendant. While qualified immunity should be invoked in every case in which an officer's conduct was arguably within the bounds of the law, in this case no such argument can be made. The officers' conduct in the prosecution of Jean was reprehensible and a total betrayal of the trust that society places in those whom it empowers to enforce the law. That Jean will not be allowed the opportunity to present his claim to a jury only perpetuates the injustices that have befallen him in the legal process. . . . "

App. 37-38

CONCLUSION

The issues presented in this case merit consideration by this Court. There are no collateral issues which will complicate the Court's treatment of the case and lengthen the proceedings. The case at bar presents a series of critical questions regarding qualified immunity analysis under § 1983 and dramatically implicates the nature of

qualified immunity. If the Fourth Circuit's opinion is allowed to prevail, a serious conflict will exist in the circuits, citizens within the Fourth Circuit will have far less protection than in any other geographic area of the country under § 1983 and the foundations of qualified immunity will have been seriously damaged. Accordingly, petitioner respectfully requests a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit issue to review the decision below.

Respectfully submitted, this the 15th day of December, 1998.

BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A.

RICHARD B. GLAZIER
Attorney for Petitioner
230 Green Street
P.O. Box 2275
Fayetteville, NC 28302
Telephone: (910) 323-4600
State Bar No. 9817

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LESLY JEAN, *Plaintiff-Appellant,* v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually, *Defendants-Appellees.*	No. 95-7694

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville,
Malcolm J. Howard, District Judge.
(CA-94-62-4-H2)

Argued: December 2, 1997

Decided: September 17, 1998

Before WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the majority opinion, in which Judges Widener, Wilkins, Niemeyer, Luttig, and Williams joined. Judge

Murnaghan wrote a dissenting opinion, Judge Ervin wrote a dissenting opinion, in which Judges Murnaghan, Hamilton, Michael, and Motz joined. Judge Hamilton wrote a dissenting opinion, in which Judge Murnaghan joined.

COUNSEL

ARGUED: Richard Brooks Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellees. **ON BRIEF:** Rebecca J. Britton, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant, John R. Green, Jr., WARD & SMITH, P.A., New Bern, North Carolina, for Appellees.

OPINION

WILKINSON, Chief Judge:

We granted en banc review in this case to determine whether the district court properly dismissed Lesly Jean's section 1983 claim against Jacksonville, North Carolina police officers Delma Collins and James Shingleton. The complaint alleged their failure to disclose exculpatory evidence during Jean's criminal trial for rape and first degree sexual offenses. The district court granted summary judgment in favor of Collins and Shingleton, holding they were entitled to qualified immunity. To the extent Jean claims the officers failed to disclose evidence directly to defense counsel, we hold that the officers are

entitled to absolute immunity. To the extent Jean contends Collins and Shingleton failed to turn over evidence to the prosecutor, the officers are protected by qualified immunity. We thus affirm the judgment of the district court.

I.

On July 21, 1982, at approximately 3:00 a.m., a stranger entered the house and bedroom of Alice Kathleen Wilson and forcibly raped her. Soon after the incident was reported to the Jacksonville police, the department announced the suspect's physical description – black male wearing a blue shirt, blue shorts, and white tennis shoes – to its officers via radio transmission. At approximately 4:40 a.m., Officer James Shingleton spotted a man walking along a local highway who matched the basic description from the radio dispatch. Shingleton activated the blue lights on his patrol car, exited the vehicle, and stopped the person. Shingleton questioned him, instructed him to place his hands on the fender of the car, and told him he was a suspect in a rape. At that point, the suspect fled into the adjacent woods; the encounter lasted approximately one minute and a half. Later that morning, Shingleton described the person he confronted as black, five feet ten inches tall, weighing 170 pounds, with close-cut hair and a mustache, and wearing blue shorts, a blue shirt with writing, white knee-high socks, and white tennis high-tops.

Meanwhile, Wilson was transported to the hospital for treatment and then to the police station to make a statement. She described her attacker as a black male, muscular, five feet eight inches tall, weighing about 165

or 170 pounds, with a marine haircut, kinky hair, no facial hair, and wearing dark shorts that were probably navy blue, white crew socks, and high-top sneakers. Wilson also met with a sketch artist to produce a composite of the suspect. A photograph of her composite was distributed to the Jacksonville Police Department. Afterwards, the same sketch artist also met with Shingleton but was unable to develop a reliable composite due to the incomplete nature of the officer's observations.

The following day, July 22, 1982, Detective Steve Smith, the lead investigator on the case, asked Captain Delma Collins to hypnotize Shingleton in order to garner further details about the person he stopped the morning of the crime. The hypnotic session was recorded on audio tape and its results were noted in a hypnosis information worksheet. Shingleton's memory of the possible suspect changed in at least three respects: he now believed that the tee shirt design was instead a sweat mark, he remembered that the person in fact did not have a mustache, and he recalled blue stripes on each of the person's socks. Detective Smith recorded in his notes: "As a result, his description matches the one given by victim."

On July 26, 1982, Chief of Police Roger Halbert was in a Dunkin Donuts and noticed appellant Jean, a marine stationed at Camp Lejeune in Jacksonville. Halbert believed Jean matched the composite of the suspected rapist. Halbert radioed the police department and asked that Shingleton be sent to the restaurant. When he arrived, Shingleton identified Jean as the man he had seen on the morning of the rape and accordingly arrested him. Detective Smith then interviewed Jean and, after receiving his consent, searched Jean's locker and laundry

bag at the marine base. Smith seized a pair of white high-top tennis shoes, dark blue athletic shorts with white stripes, and a blue tee shirt. Jean was fingerprinted, photographed, and then released.

The following day, July 27, 1982, Smith asked Wilson to come to the police station to view a photo lineup that included Jean's photo. After viewing the lineup, Wilson was unable to make a positive identification. The next day, Wilson called Smith at the police station requesting to look at the photos again because one of them had made her feel sick. After observing the photos a second time, Wilson picked out Jean's photo as the one that made her sick and stated that another of the photos looked "haunty." Again, however, she could not make a positive identification.

On July 30, 1982, upon the recommendation of Detective Smith, Captain Collins hypnotized Wilson in an effort to determine whether she could remember anything more about the photo that made her feel sick. Wilson's prehypnotic memories were recorded on a prehypnosis information worksheet, the session was recorded on audio tape, and new information was noted on another worksheet. At least three new pieces of information emerged during the session: Wilson believed her attacker had an accent, possibly Puerto Rican, and she recalled white shoelaces and a Nike emblem in connection with the attacker's shoes. Collins and Smith deemed the session to be unproductive due to the paucity of new details.

In the following two months, Wilson was asked to listen to voice identification recordings and view a live

lineup. On August 4, 1982, after listening to several voice exemplars numerous times, Wilson stated that Jean's voice sounded like the one from her bedroom. Although Smith initially assumed she did not make a positive identification that day, Wilson later called him and explained that her statement was intended as a positive identification. She then confirmed again that Jean's voice exemplar was the voice of the man who had raped her. On September 17, 1982, Wilson was asked to view a live lineup consisting of three persons, including Jean. Wilson identified Jean as the person who had raped her and the police placed him under arrest.

Jean was indicted in October 1982 for rape and first degree sexual offenses. Despite timely discovery requests, the prosecutor did not disclose the fact that witnesses had been hypnotized until Wilson's testimony at trial. The prosecutor also did not disclose the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request for such recordings by defense attorneys at trial. The jury, however, was made aware of Wilson and Shingleton's hypnoses, as defense counsel cross-examined both witnesses on that point.

On December 5, 1982, Jean was convicted on all counts and sentenced to two consecutive life terms. After his direct appeals and applications for state postconviction relief proved unsuccessful, Jean filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. In *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991) (per curiam), we reversed that court's denial of his petition, holding that the government's failure to disclose the audio recordings and the

accompanying reports of the hypnotic sessions was a violation of the principles announced in *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, we vacated Jean's conviction. The state declined to retry Jean, and he was released from prison.

On May 20, 1994, Jean filed the present complaint against Collins and Shingleton in the United States District Court for the Eastern District of North Carolina, alleging Fourth Amendment and Fourteenth Amendment Due Process Clause violations under 42 U.S.C. § 1983 and supplementary state-law claims. The district court dismissed Jean's state causes of action, holding that one failed to state a claim and that the others were barred by the applicable statute of limitations. In a later order, the district court granted summary judgment in favor of Collins and Shingleton on Jean's section 1983 claims, holding the police officers were protected by qualified immunity. Jean appealed the district court's summary judgment order only with respect to his due process claim. A panel of this court reversed the decision of the district court. *Jean v. Collins*, 107 F.3d 1111 (4th Cir. 1997). Thereafter, a majority of the judges in active service voted to rehear this appeal en banc.

II.

Initially we note that Jean's due process claim, alleging suppression of exculpatory evidence, does not clearly state the precise theory upon which it is premised. *See Burns v. Reed*, 500 U.S. 478, 487 (1991) (in cases implicating official immunity "it is important to determine the precise claim that petitioner has made"). At times, Jean

contends his constitutional rights were violated as a result of Collins and Shingleton's failure to turn over evidence to the District Attorney's Office. At other times, however, Jean asserts that the officers generally suppressed the relevant evidence. *See* Compl. ¶ 41. (referring to "the actions of defendants in withholding exculpatory evidence"). Both Collins and Shingleton clearly understood Jean's complaint to allege their failure to disclose evidence directly to Jean's defense counsel. *See* Collins Aff. ¶ 20 ("At no time did I intentionally withhold this evidence from Mr. Jean's defense counsel."); Shingleton Aff. ¶ 21 ("At no time in my career as a police officer have I been trained that I am responsible for deciding what evidence will be presented at trial or disclosed to a criminal defense counsel in response to legal discovery requests."). To the extent Jean asserts a duty on the part of Collins and Shingleton to turn over exculpatory evidence to the defense, that claim must fail. Police officers are absolutely immune from suits challenging a failure to disclose evidence directly to the defense.[1]

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[1] In his dissenting opinion, Judge Ervin claims we are precluded from considering the absolute immunity of Collins and Shingleton because it was not pled or addressed in prior proceedings. The officers did plead the defense of qualified immunity, however, and we may properly consider the closely related question of the scope of the immunity to which they are entitled. *See Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1168 n.5 (4th Cir. 1982). Failure to do so here would create the possibility that qualified immunity would incorrectly be accepted as the limit of protection for police officers "performing functions that require the exercise of prosecutorial discretion." *Kalina v. Fletcher*, 118 S.Ct. 502, 507 (1997).

The doctrine of absolute immunity under section 1983 rests on the assumption that Congress did not intend to abolish certain well-established immunities recognized by courts at the time of section 1983's enactment. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). To evaluate government officials' specific claims for absolute immunity, the Supreme Court has adopted a functional approach – inquiring whether the particular official performs functions similar to those protected by common-law immunities when Congress enacted section 1983. *Id.* at 268-69; *Burns*, 500 U.S. at 484, 486; *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The Court recently reaffirmed this functional approach in *Kalina v. Fletcher*, 118 S.Ct. 502, 510 (1997), holding that a prosecutor personally attesting to the truth of facts necessary for a probable cause determination was not absolutely immune from suit because she functioned not in a prosecutorial role, but as a witness. The Court reiterated that "in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.' " *Id.* at 508 (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)); *see Buckley*, 509 U.S. at 269; *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *Carter v. Burch*, 34 F.3d 257, 261-62 (4th Cir. 1994); *see also Ireland v. Tunis*, 113 F.3d 1435, 1443 (6th Cir.), *cert. denied*, 118 S.Ct. 560 (1997); *Hill v. City of New York*, 45 F.3d 653, 660 (2d Cir. 1995).

In *Fletcher* the Court explained that, to protect the independent judgment of prosecutors, an official is absolutely immune from suit when "performing functions that require the exercise of prosecutorial discretion." 118 S.Ct. at 507. The decision whether to disclose exculpatory

evidence to an adversary is a central part of the prosecutor's trial preparation, is undertaken in the role of advocate for the State, and plainly requires the exercise of prosecutorial discretion. *Imbler* itself involved the prosecution's alleged suppression of material evidence at trial. 424 U.S. at 413-16. And subsequent decisions have left no doubt that prosecutors enjoy absolute immunity from claims alleging a failure to disclose exculpatory evidence. For example, the Court in *Fletcher* described *Imbler* as providing an absolute immunity defense to the prosecutor from Imbler's "charge that exculpatory evidence had been suppressed." *Fletcher*, 118 S.Ct. at 506. And in *Burns*, the Court explained that its *Imbler* decision, pursuant to the functional approach, held the prosecutor absolutely immune from suit for the "deliberate suppression of exculpatory evidence." *Burns*, 500 U.S. at 486. The Court has also stated that actions for which a prosecutor is accorded absolute immunity "must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 273; *see Ireland*, 113 F.3d at 1445.

We have likewise read *Imbler* to require absolute immunity from section 1983 claims alleging suppression of exculpatory evidence. In *Carter*, we held that "the decision as to whether the evidence was exculpatory and should have been given to defense counsel . . . was clearly intended by *Imbler* to be the type of prosecutorial function for which absolute immunity should be granted." 34 F.3d at 262; *see also Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996) ("The Supreme Court also held in

Imbler that absolute immunity protected the prosecutor from allegations that he had knowingly used perjured testimony and suppressed material evidence at the plaintiff's trial."). We explained in *Carter* that the decision whether to disclose evidence to the defense "is clearly part of the presentation of the State's case" and represented conduct undertaken as an advocate for the State. 34 F.3d at 262-63. Other circuits have reached the same conclusion. *See Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995), *cert. denied*, 117 S.Ct. 75 (1996); *Reid v. New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995) ("under *Imbler* it is now [a] well-settled rule that a prosecutor cannot be held personally liable for the knowing suppression of exculpatory information" (internal quotation marks and citation omitted)); *Hill*, 45 F.3d at 661-62; *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987).

To the extent, therefore, that Jean contends that Collins and Shingleton failed to disclose exculpatory evidence directly to the defense, the police officers are entitled to the same absolute immunity that would be available to prosecutors for execution of the identical function. Jean's claim casts the officers in a role much different from their traditional investigatory one. Police officers normally assemble available evidence for the prosecution rather than evaluate it for trial purposes. *Buckley*, 509 U.S. at 273. Prosecutors assess the material and exculpatory nature of that evidence in determining whether disclosure to the defense is required. By asserting that the police have a duty to make such sensitive legal determinations, Jean raises a claim against the officers not in their investigatory role, but instead in an advocate's role "intimately associated with the judicial

phase of the criminal process." *Imbler*, 424 U.S. at 430. Under the Court's approach, the officers must be accorded absolute immunity.

The fact that the defendants in the present suit are police officers, rather than prosecutors, is irrelevant to the immunity analysis. Because the immunity is tied to the nature of the function performed and not to the identity of the defendant performing that function, *e.g.*, *Fletcher*, 118 S.Ct. at 508, we look to the conduct challenged by Jean's suit rather than the defendants' titular position. The Court has specifically recognized that "[w]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276; *see also Hill*, 45 F.3d at 660 (extending absolute immunity to non-attorney employees of district attorney's office under functional approach); *Davis v. Grusemeyer*, 996 F.2d 617, 631 (3d Cir. 1993) (extending absolute immunity to employee working for attorney "when the employee's function is closely allied to the judicial process"). It would be incongruous to hold prosecutors absolutely immune from suits concerning disclosure decisions made in the course of their traditional advocate's role while granting police officers only qualified immunity with respect to the same decisions, which fall outside their normal investigatory role.

We note finally that the same considerations underlying absolute immunity for prosecutors also support granting police officers absolute immunity from suits alleging failure to disclose exculpatory evidence to the

defense. The Court in *Imbler* first relied upon the common-law concern that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties." 424 U.S. at 423. The Court noted that "[s]uch suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425. The same consideration countenances absolute immunity for the police officers in the present action. Because police uncover most evidence in criminal investigations, suits alleging suppression of exculpatory evidence could be leveled against them in almost every case. *Imbler's* observation that "a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation," *id.*, would be no less true of police officers forced to make the difficult determinations surrounding the State's disclosure obligations. Without absolute immunity from section 1983 claims like Jean's, the police would be forced to defend against vexatious litigation and their "energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Id.*

The Court in *Imbler* also relied upon the common-law concern that the fear of civil liability would create "the possibility that [a prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. It is unlikely that police officers, who lack prosecutors' legal training, would be more able to confidently reach independent legal conclusions regarding the State's disclosure obligations without fear of civil liability. In fact, officers fearing

personal liability would likely turn over much more evidence than necessary, thereby transforming the combination of section 1983 and *Brady* obligations into more absolute rights to discovery for criminal defendants. This would fundamentally change our adversarial system and harm the judicial process. "The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). Granting police officers absolute immunity from suits alleging a failure to disclose accords with the considerations traditionally cited in favor of absolute prosecutorial immunity – preservation of government officials' independent judgment, *Imbler*, 424 U.S. at 423, and the more general protection of the judicial process. *Burns*, 500 U.S. at 485.

Finally, we note that an adequate remedy for police officers' failure to disclose exculpatory evidence already exists in the criminal law. Whenever the State withholds material exculpatory evidence from the defense, the Constitution requires that any conviction gained thereby be vacated. *Bagley*, 473 U.S. at 678; *Giglio v. United States*, 405 U.S. 150, 155 (1972); *Brady*, 373 U.S. 83. The adequacy of judicial remedies for prosecutorial misjudgments " 'tend[s] to reduce the need for private damages actions as a means of controlling unconstitutional conduct.' " *Burns*, 500 U.S. at 492 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)); *Imbler*, 424 U.S. at 427; *Springmen v. Williams*, 122 F.3d 211, 214 (4th Cir. 1997).

In sum, we find that absolute immunity for police officers performing prosecutorial functions is mandated

by well-settled doctrine of the Supreme Court. We decline to make police officers into mini-prosecutors and to impose upon them obligations that would cut actual prosecutors out of the loop. From any claim that Collins and Shingleton failed to disclose exculpatory evidence directly to the defense, the officers are absolutely immune from suit.

III.

Jean next asserts that the officers had a constitutional duty under *Brady* to turn over evidence to the prosecution relating to Wilson's and Shingleton's hypnoses. Regardless of whether Jean's claim presently states a constitutional violation, we conclude that Shingleton and Collins are entitled to qualified immunity. In 1982, a reasonable police officer would not have known that his failure to turn over such evidence violated a criminal defendant's clearly established constitutional rights.

A.

The basic purposes of qualified immunity are well known. The immunity is designed to shield government officials performing their duties from the burdens of trial and the threat of monetary liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Without such an immunity, the operations of government would be immobilized." *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991). Government officials would not perform their discretionary duties vigorously but would act timidly to avoid the risk of being haled into federal court. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow*, 457 U.S. at 814. Society

also would bear substantial costs including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814; *see also Anderson*, 483 U.S. at 638; *Tarantino v. Baker*, 825 F.2d 772, 774 (4th Cir. 1987). To limit these costs, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Thus, government officials forfeit this defense only where a reasonable official would have known that an action violated clearly established constitutional rights. *Harlow*, 457 U.S. at 818; *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (en banc).

The requirement that a right be clearly established ensures that officials have ample notice of the legal standards that govern their conduct. *See Davis v. Scherer*, 468 U.S. 183, 195 (1984). Consistent with this need for notice, a court must identify the right infringed at a high level of particularity. *Anderson*, 483 U.S. at 639; *Winfield*, 106 F.3d at 531. To define the right too abstractly would convert the defense of qualified immunity "into a rule of virtually unqualified liability." *Anderson*, 483 U.S. at 639; *see also DiMeglio v. Haines*, 45 F.3d 790, 803-04 (4th Cir. 1995). Of course *Anderson* does not require that a prior case have held identical conduct to be unlawful. *Id.* at 640. But officers cannot be ambushed by newly invented theories of liability or by unforeseen applications of old ones. Thus, "the 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991) (quoting *Anderson*, 483 U.S. at 640); *see also Lassiter v. Alabama A & M Univ.*, 28

F.3d 1146, 1150 (11th Cir. 1994) (en banc) ("For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [the] defendant is doing violates federal law *in the circumstances.*").

In order for notice to officials to be effective, the source of that notice must be identified. It is clear that a court cannot confine its assessment of an immunity defense to Supreme Court decisions alone. *See United States v. Lanier,* 117 S.Ct. 1219, 1226 (1997). It is equally clear that a court cannot restrict its inquiry to cases identified by the parties. *Elder v. Holloway,* 510 U.S. 510, 515 (1994). But government officials must have some guideposts about the sources of law that can clearly establish a particular right. Our nation's courts produce a vast number of decisions that could conceivably influence officials' discharge of their duties. *See Swanson,* 937 F.2d at 968. Officials cannot be expected to master the entire corpus of this caselaw in addition to fulfilling their public responsibilities. *See Davis,* 468 U.S. at 196 & n.13. The very immensity of American jurisprudence creates the distinct likelihood that jurisdictions will offer conflicting opinions over how government officials should carry out their tasks. *See Swanson,* 937 F.2d at 968. To hold officials responsible for sorting out these conflicts, without any guidance about what jurisprudence to follow, could generate widespread confusion over the scope of official obligations. An unbounded legal universe would give rise to guessing games over whether this or that decision in this or that jurisdiction created a clearly established

right. Such a limitless universe would also give judges broad latitude to second-guess the actions of officers on the spot.

Ordinarily, therefore, courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular time. *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (en banc); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980). This presumption, like the Eleventh Circuit's longstanding practice, provides necessary guidance to government officials about whether a contemplated course of conduct may subject them to personal liability. *See Jenkins by Hall v. Talladega Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, 118 S.Ct. 412 (1997); *Hamilton By and Through Hamilton v. Cannon*, 80 F.3d 1525, 1531 n.7 (11th Cir. 1996); *Courson v. McMillian*, 939 F.2d 1479, 1497-98 (11th Cir. 1991). Thus, if a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense. Of course, the converse also holds true. If a right is clearly established in this circuit but not in another circuit, that conflict will not shield the official from liability. The approach we adopt will place parameters upon the immunity inquiry – if immunity is to stem litigation, as the Supreme Court intended, the issue of whether a right is clearly established should not send public officials on an Odyssean quest.

B.

In this case, we must analyze the state of the law in 1982 to determine whether Collins and Shingleton violated a clearly established constitutional right. *Anderson* requires that the right be defined at a high level of particularity. But even at the highest level of generality, the right which Jean asserts was not clearly established in 1982. Jean has failed to demonstrate that, at that time, police had a duty grounded in federal law to turn over the evidence at issue to a prosecutor.

Several of the cases on which Jean relies do not even discuss whether police officers had any constitutional duty to provide evidence to a prosecutor. As of 1982, the Supreme Court had not held that police had such a constitutional duty; *Brady* and its progeny instead involved prosecutors' failures to disclose evidence to the defense. *E.g., United States v. Agurs*, 427 U.S. 97, 107 (1976); *Giglio*, 405 U.S. at 154; *Brady*, 373 U.S. at 87-88. With respect to this circuit's decisions, many of those advanced by Jean involved nondisclosure by prosecutors or are otherwise totally inapposite. *E.g., Norris v. Slayton*, 540 F.2d 1241, 1244 (4th Cir. 1976) (prosecutor's failure to disclose police officer's report held *Brady* violation); *Clarke v. Montgomery Ward & Co.*, 298 F.2d 346, 348 (4th Cir. 1962) (private common law action for malicious prosecution brought under diversity jurisdiction). These cases simply lack the requisite factual similarity to the instant case. Police officers in 1982 could not have been expected to survey decisions involving prosecutors' failures to disclose evidence to the defense and conclude that, by analogy, they bore an independent constitutional duty to provide evidence to prosecutors. Thus, this line of authorities cannot

demonstrate that Shingleton and Collins violated Jean's clearly established constitutional rights.

Jean asserts that this circuit's opinion in *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964), imposed a constitutional duty on police officers to give evidence to a prosecutor. In *Barbee*, the prosecutor failed to disclose certain police reports to the defense. *Id.* at 844. These reports contained the results of ballistics and fingerprint tests that cast doubt on Barbee's involvement in a shooting. *Id.* Although the prosecutor was unaware of the reports, this court held that his ignorance did not excuse his failure to disclose them to the defense and reversed a district court order denying Barbee postconviction relief. *Id.* at 846.

We believe that Jean misapprehends the essential holding of *Barbee*. *Barbee* did not require police, as a constitutional matter, to furnish evidence to a prosecutor. Instead, as this circuit later explained, *Barbee* held simply that the police's knowledge of such evidence would be imputed to the prosecutor in deciding whether the prosecutor had fulfilled his *Brady* duties. *United States v. Sutton*, 542 F.2d 1239, 1241 n.2 (4th Cir. 1976); *see also Boone v. Paderick*, 541 F.2d 447, 450-51 (4th Cir. 1976). By imputing the police's knowledge of exculpatory evidence to the prosecutor, *Sutton* and *Barbee* simply encouraged prosecutors' offices to establish "procedures and regulations . . . to insure communication of all relevant information on each case." *Giglio*, 405 U.S. at 154. Thus, while prosecutors are not relieved of their *Brady* duties for failing to disclose material evidence known only to the police, police officers who in 1982 failed to give such

evidence to prosecutors did not themselves violate a clearly established constitutional right.[2]

In sum, police officers in 1982 could reasonably have expected to be internally accountable to prosecutors for not turning over evidence in their possession. A failure to turn over exculpatory evidence might jeopardize a conviction under *Brady*. A failure to turn over inculpatory evidence might undermine the State's case. But the officers had no earthly idea that they would be subject to a federal cause of action for money damages when no relevant decision had held that the police's responsibility to furnish evidence to the prosecution was governed by federal constitutional law.[3]

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[2] In their dissenting opinions, Judge Ervin and Judge Hamilton dispute our reading of *Barbee*. Our reading, however, is supported both by the Supreme Court's decision in *Giglio*, 405 U.S. at 154, and this circuit's decisions in *Sutton*, 542 F.2d at 1241 n.2, and *Boone*, 541 F.2d at 450-51. Each of these decisions predates the relevant conduct of Collins and Shingleton. In contrast, the dissents' view of *Barbee* rests on implications from caselaw that postdates the relevant conduct in this case.

[3] More recently this circuit has recognized that the failure of police officers to turn over evidence to a prosecutor may violate a criminal defendant's constitutional right to receive such evidence. *See Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996); *Carter*, 34 F.3d at 264; *Goodwin v. Metts*, 885 F.2d 157, 162-63 (4th Cir. 1989), *overruled in part by Albright v. Oliver*, 510 U.S. 266 (1994). Contrary to Judge Hamilton's claim that the majority fails to explain what it means by proper notice, the decisions in *Taylor*, *Carter*, and *Goodwin* now provide notice to police officers that they can be subject to monetary damages under section 1983 for failure to disclose exculpatory evidence to the prosecutor. These decisions, however, all postdate the events in this case and thus we do not adopt the dissent's theory that proper notice to defendants can be notice after the fact.

In this case, it is undisputed that the prosecutor, Assistant District Attorney Walter Vatcher, knew that the witnesses had been hypnotized and knew the details of the various identification procedures employed by the police during their investigation. Furthermore, Collins and Shingleton maintain that they also discussed with Vatcher the existence of the reports and recordings of the hypnoses, a claim Vatcher denies. Fifteen years after trial, the parties are still disputing the value of the hypnosis-related evidence, whether Vatcher was derelict in failing to ask for further details of it, and whether Shingleton and Collins were derelict in not providing it. In fact, however, the Supreme Court in *Giglio* had charged the prosecution with the duty to request and evaluate relevant evidence in the State's possession. *Giglio*, 405 U.S. at 154. Vatcher never contends in his affidavits that he asked for any materials related to the hypnoses, as might be expected of a prosecutor's office after *Giglio*. Furthermore, Vatcher admitted that "[o]fficers Shingleton and Collins turned over all evidence that I requested from them." His apparent decision not to request additional details of the hypnoses cannot now be recast as a constitutional failure by the police officers to disclose such evidence.

Even if there were some general constitutional obligation in 1982 to hand over evidence to a prosecutor, the precise nature of that duty was anything but clear. Nothing in the applicable caselaw suggested that the failure to turn over evidence relating to witnesses' hypnoses violated clearly established constitutional rights. As of 1982, no decision of either the Supreme Court or this circuit had held that police committed a constitutional violation

by not handing over evidence of this sort. Of course, we do not require a case with facts identical to the instant one. *Anderson*, 483 U.S. at 640. But here no relevant case remotely resembled the situation confronted by Shingleton and Collins. Under these circumstances, we cannot hold them liable for a constitutional infraction.

Jean finally relies on several cases from other circuits, but such cases ordinarily do not demonstrate that a constitutional right was clearly established in this circuit. Most of these decisions do not even pertain to a police officer's failure to hand over evidence of witnesses' hypnoses to a prosecutor. Two cases did involve the disclosure of hypnosis-related evidence. One comes from the Second Circuit. *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969). That decision does not even speak to the constitutional strictures on police conduct. *Miller* involved only a prosecutor's failure to disclose evidence of a hypnosis to the defense. *Id.* at 832. Thus, it cannot demonstrate that Shingleton and Collins violated Jean's clearly established constitutional rights.

The other case comes from the Northern District of Georgia. *Emmett v. Ricketts*, 397 F.Supp. 1025 (N.D.Ga.1975). Like *Miller*, *Emmett* is not binding authority in this circuit. Further, district court decisions such as *Emmett* cannot clearly establish a constitutional right because "while they bind the parties by virtue of the doctrine of res judicata, they are not authoritative as precedent and therefore do not establish the duties of nonparties." *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995); *see also D'Aguanno v. Gallagher*, 50 F.3d 877, 880 n.5 (11th Cir. 1995). In addition to lacking precedential force, district court opinions from other jurisdictions function

as especially poor sources of law to demonstrate that a right was clearly established. Police officers in Jacksonville, North Carolina can hardly be expected to keep abreast of legal developments in the Northern District of Georgia to determine the scope of their constitutional obligations.

C.

A word about the dissenting opinions. The three dissenting opinions together illustrate why the qualified immunity defense had to be adopted in the first place. The dissents would impose novel theories of civil liability on officers in the absence of notice – precisely the danger against which the defense of qualified immunity was designed to guard. *See Davis*, 468 U.S. at 195. The dissents somehow seize on vague proscriptions of "unfair" police conduct as determinative guideposts by which Collins and Shingleton should have measured their conduct. *See post* at 19 (Murnaghan, J., dissenting) (explaining that police's duty is "to protect every one of us from injustice" and that the officers' actions "were manifestly unfair"). The dissents also introduce post-1982 caselaw as support for a rule of law that officers should have anticipated in 1982. *See post* at 24 (Ervin, J., dissenting) (citing 1989 case); *post* at 29 (Hamilton, J., dissenting) (citing 1989, 1992, and 1996 cases). Furthermore, the dissents point to decisions outside this circuit as beacons of light that should have been recognized from afar by the North Carolina police officers in this case. *See post* at 20 (Murnaghan, J., dissenting) (citing decisions from the D.C. Circuit and the Northern District of Georgia).

In sum, the dissents would fail to provide even the rudiments of notice to those whose conduct they now rush to condemn. One even goes so far as to say that "[i]t is irrelevant whether the officers would have been on notice in 1982 that a panel of this court had held other officers liable for a *Brady* violation under § 1983" because "the underlying constitutional or statutory right upon which the § 1983 action is premised" can provide the needed guidance. *See post* at 25 (Ervin, J., dissenting). Yet it is precisely the bare-boned vagueness of constitutional phraseology that cannot guide the qualified immunity analysis. *Anderson* in fact emphasized as much in rejecting "the right to due process of law" as a helpful guide. *See* 483 U.S. at 639 ("[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."). The hope for professional police work lies in the guidance provided by clearly communicated rules, not in the unbounded approaches adopted by the various dissenting opinions.

This case involves an attempted end run around the absolute immunity protecting the prosecutor – a prosecutor who knew not only of the hypnosis of witnesses but also of the various identification procedures the officers employed. Blocked from pursuing a civil damages remedy against a prosecutor who admitted receiving all the evidence he requested from the investigating police officers, Jean now tries to shift the blame to the officers themselves. Although this circuit now recognizes that police too may be subject to *Brady* duties, it had not yet recognized such duties in 1982. And it would be wrong to allow the thwarting fact of prosecutorial immunity to

force this case into an altogether different mold – one where the police officers are subject to constitutional duties that in fact materialized only after Jean's prosecution.

In conclusion, the relevant sources of law do not clearly establish that in 1982 police themselves labored under federal constitutional duties with respect to the disclosure of evidence to the prosecution or that such duties, if any, included a responsibility to disclose evidence relating to witnesses' hypnoses. In holding that these officers are entitled to qualified immunity, we do not diminish the seriousness of Jean's incarceration. But this court already has granted his petition for a writ of habeas corpus. *Jean v. Rice*, 945 F.2d 82. To go further, however, and impose money damages against Shingleton and Collins would blindside these defendants and make them into scapegoats with the aid of many years of hindsight. It would also violate the cardinal principle of qualified immunity – that officials may not later be subject to monetary liability when their behavior at the time did not violate any clearly established constitutional right.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

The substance of the point which I dissent to emphasize has been made more politely by Judge Ervin in his

dissent. He has refrained, because he is more of a gentleman than I, from using some clear and simple words that judges should abide by. Judges should unflinchingly see that fairness prevails, particularly in the conduct of police. The overwhelming duty of officers sworn to enforce the law is to protect every one of us from injustice. The proper responsibility of the police is to identify, indict, convict and imprison actual criminals; the actions of Officers Shingleton and Collins, which led to the wrongful conviction and lengthy imprisonment of Lesly Jean, were manifestly unfair.

The majority opinion marks an unmistakable movement in this circuit to a rule of actually unqualified, though technically called qualified, immunity for police officers. The means by which this has been accomplished while paying lip service to qualified immunity principles are three-fold: emphasis upon the special exigencies of police work with its unique demands for spontaneous, unreflective action; a perceptible lowering of the objective reasonableness standard for assessing police awareness and conduct in particular cases; and, closely related to the latter, a dramatic narrowing of that law which, for police officers, will be considered well-settled at the critical time. The last of these is the principal vehicle by which the majority finds qualified immunity here. Judge Ervin's dissent persuasively demonstrates the error in that analysis.

The majority holds today that "[o]rdinarily, . . . courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular

time." *Maj. op.* at 13. I disagree that such an approach should inevitably be applied, and would consider pertinent authority from other jurisdictions in determining whether a constitutional right was clearly established at the time of the alleged violation. *See, e.g., United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971) (holding that "[t]he duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies"); *Emmett v. Ricketts*, 397 F.Supp. 1025, 1040-42 (N.D.Ga.1975) (noting that *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), was "particularly apropos" in holding that a hypnotist hired by the prosecutor had a duty to disclose records of hypnosis). I emphasize, moreover, that a right may be clearly established even though no prior case exists involving the "very action" challenged as unlawful, *see Anderson v. Creighton*, 483 U.S. 635, 640 (1987), a rule we often repeat but only rarely apply.

Diligent and honest pursuit of lawbreakers by police officers is the rule, and we should require no less. That duty undoubtedly includes the obligation to furnish the prosecutor with exculpatory evidence, and that responsibility was clearly established in 1982. I dissent.

ERVIN, Circuit Judge, dissenting:

The majority holds that Lesly Jean had no clearly established constitutional right to the delivery of material, exculpatory evidence from Officers Collins and Shingleton ("the officers") to the prosecutor during his 1982 trial. For the reasons below, I find the majority's absolute immunity analysis unnecessary and its discussion of the

qualified immunity question unpersuasive. Therefore, I respectfully dissent.

I.

The majority begins its analysis with an extended discussion of the officers' absolute immunity from § 1983 liability on a theory, purportedly advanced by Jean, that the officers were under a duty to deliver material, exculpatory evidence *directly* to Jean's defense counsel. The majority strains to point to evidence of this theory in the record because the argument is nowhere to be found in Jean's brief on appeal. In fact, Jean clearly argues that the constitutional violation at issue is the officers' failure to disclose evidence to the *prosecutor*, and not directly to defense counsel. In Jean's brief, the "Statement of Issue Presented for Review" identifies the constitutional right at issue as "a law enforcement officer's obligation to disclose exculpatory evidence *to prosecutors*." *Appellant's Br.* at 1 (emphasis added). In his "Summary of the Argument," Jean mentions four times, in one and one-half pages, that the officers were under an obligation to disclose evidence to the prosecutor. *See Appellant's Br.* at 23-24. So far as I can determine from the record, Jean has never actively pursued a theory of liability for the officers' failure to disclose evidence directly to defense counsel. For that reason, there has been no discussion of absolute immunity in any of the previous proceedings in this case.

This is significant because immunity is an affirmative defense that must be pled lest it be waived. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Wilkes v. Young*, 28 F.3d

1362, 1377 n.12 (4th Cir. 1994) (Phillips, J., dissenting); *Buenrostro v. Collazo*, 973 F.2d 39, 44 (1st Cir. 1992). While the officers' answer to the complaint raises the defense of "qualified good faith immunity," *see J.A.* at 39, it says nothing of absolute immunity. On this very question, the Sixth Circuit has held that a defendant waives his right to absolute immunity if he raises only qualified immunity in his answer, motion to dismiss, or summary judgment motion. *See Collyer v. Darling*, 98 F.3d 211, 222 (6th Cir. 1996) ("Although [the defendant] did raise the affirmative defense of qualified immunity, an absolute immunity determination involves an entirely different analysis. Given that the defense of absolute immunity was not affirmatively pleaded or argued . . . and in light of the significant distinctions between qualified and absolute immunity claims, this defense was affirmatively waived . . . . "), *cert. denied*, 117 S.Ct. 2439 (1997).

If, as the majority believes, "Collins and Shingleton clearly understood Jean's complaint to allege their failure to disclose evidence directly to Jean's defense counsel," *maj. op.* at 6, then the officers were obliged to raise absolute immunity as an affirmative defense in their answer to that complaint or, at the very least, in their memorandum in support of their motion for summary judgment. While I do not believe that Jean has proceeded on a theory that police officers must disclose evidence directly to defense counsel, if the majority is correct that he has, then the officers have waived any claim of absolute immunity that may have been available.

I also would note that the majority's discourse on absolute immunity does nothing to call into question our cases in which police officers have been held liable for

money damages for failure to turn over material, exculpatory evidence to the prosecutor. *See Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996); *Carter v. Burch*, 34 F.3d 257, 263-64 (4th Cir. 1994). The majority's discussion of absolute immunity merely clarifies that, as a matter of theory, a police officer may be liable for a *Brady* violation under § 1983, not because he is under a duty to disclose evidence directly to defense counsel, but rather, because his duty is to deliver such information to the prosecutor.

II.

Having toppled its straw man, the majority proceeds to answer the real question raised by this case – whether the officers are entitled to qualified immunity on Jean's theory that they were under a duty to deliver material, exculpatory evidence to the prosecutor. In section III of its opinion, the majority holds that the officers are entitled to qualified immunity because it was not clearly established in 1982 that the officers violated the law in failing to hand over material, exculpatory evidence to the prosecutor. For the reasons I expressed in my opinion for the panel in this case, *see Jean v. Collins*, 107 F.3d 1111 (4th Cir. 1997), *vacated*, (Sep. 19, 1997), and for those articulated by Judge Hamilton in his concurring opinion, *see Jean*, 107 F.3d 1118-20, I disagree with the judgment of the majority of the court. Aside from those general arguments, however, I wish to point out my specific disagreements with the reasoning in the majority opinion.

In order to do this, it is helpful to recognize exactly what requests for evidence were made by defense counsel in this case. Defense counsel in fact made *two* requests for

evidence. The first was a generalized motion for discovery that included the following requests: 1) "[t]o disclose the facts and circumstances surrounding any- . . . pretrial identification;" and 2) "[t]o permit the defendant to inspect and copy . . . mechanical or electronic recordings, tangible objects, or copies or portions thereof." *Jean v. Rice*, 945 F.2d 82, 85 (4th Cir. 1991).

The second request for evidence came after trial had already begun, when defense counsel learned for the first time, during the State's direct examination of the victim, that both she and Officer Shingleton had been hypnotized by Collins. At that point, defense counsel renewed their motion for discovery and asked the prosecution for any tapes or notes that were made during the hypnoses. The panel that granted Jean's habeas petition recognized this second request, *see Jean*, 945 F.2d at 85 ("After learning of the hypnosis, counsel requested any recordings that might exist – inexplicably the state still did not provide its records or tapes."), as does the majority in this case, *see maj. op.* at 5 ("The prosecutor also did not disclose the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request for such recordings by defense attorneys at trial."). Defense counsel not only made a "more" specific request for evidence, they could not have been any more specific: defense counsel requested an audiotape or notes from the hypnoses, if any such tape or notes existed. We know now that the officers created an audiotape and took notes during the hypnoses, that this evidence was in the officers' possession, and yet it was not given to the prosecutor.

I point this out to indicate how the majority's discussion in page 16 of its opinion is not dispositive of the question on appeal. As to the first, generalized request for discovery, the majority argues that because of the nature of the evidence in question (hypnosis evidence), the officers may or may not have known that such evidence would fall under the rubric of material, exculpatory evidence. But as to defense counsel's second request, specifically asking for any existing tapes or notes of the hypnoses, the nature of the evidence drops out of consideration.

Surely the majority would agree that, as a general matter, Jean had a clearly established right in 1982 to material, exculpatory evidence that had been specifically identified and requested by his defense counsel. In light of defense counsel's specific request for tapes or notes from the hypnoses, the nature of the evidence is irrelevant to the *Brady* question. Defense counsel requested any audiotape or notes that might exist regarding hypnosis; those tapes and notes existed, the officers knew they existed and were within their control, and yet the officers did not turn them over to the prosecutor.

Stripped of its surplusage, then, the majority's holding in this case rests on its argument that in 1982 a reasonable police officer would not have known that in concealing evidence from the prosecutor he violated the constitutional rights of a criminal defendant. The majority concedes that recent precedent in this circuit recognizes that such police misconduct can be a violation of a defendant's constitutional rights. *See maj. op.* at 15 n.3 (citing *Goodwin v. Metts*, 885 F.2d 157, 162-63 (4th Cir. 1989), *overruled in part by Albright v. Oliver*, 510 U.S. 266

(1994)). The majority's argument is simply that while this right is now clearly established, it was not in 1982. Although the majority cites and recognizes this court's decision in *Goodwin v. Metts*, the majority fails to appreciate its significance.

In *Goodwin*, the court confronted the identical question posed in this case: whether a police officer should receive qualified immunity in a § 1983 action for failing to disclose exculpatory information in his possession to the prosecutor. The importance of *Goodwin* is that the conduct at issue in that case occurred *in 1983*, the year after the events at issue in this case. *Goodwin* held that a police officer was not entitled to qualified immunity for failure to turn over exculpatory evidence to a prosecutor because such conduct violated a constitutional right that was clearly established in 1983: "A reasonable officer would have known that a prosecution carried out without . . . disclosure of exculpatory information would violate the constitutional rights of the criminal defendants." *Goodwin*, 885 F.2d at 164. Since the majority does not call *Goodwin* into question, I assume the majority would agree that had the events at issue in this case taken place in 1983, the illegality of the officers' conduct would have been clearly established.

The majority's analysis of this issue reveals a misunderstanding about my use of *Goodwin*, *see maj. op.* at 17, as well as the nature of qualified immunity. A right does not become clearly established when a plaintiff successfully brings an action to enforce it under § 1983, as the majority apparently believes. *See maj. op.* at 15 ("[T]he officers had no earthly idea that they would be subject to a federal cause of action for money damages. . . . "); *maj. op.* at 15

n.3 ("Goodwin now provide[s] notice to police officers that they can be subject to monetary damages under section 1983. . . . "). It is irrelevant whether the officers would have been on notice in 1982 that a panel of this court had held other officers liable for a *Brady* violation under § 1983. The question is whether the underlying constitutional or statutory right upon which the § 1983 action is premised was clearly established at the time the officers acted. *Goodwin* is clear in its holding that the constitutional right at issue in this case was clearly established in 1983, one year after the officers' conduct here.

In order to go along with the majority's position, then, one must assume that a case was decided between 1982 and 1983 which clearly established that police officers violate the constitutional rights of a criminal defendant when they conceal material, exculpatory evidence from the prosecutor. This is the only way to reconcile the majority's opinion, holding that "police officers who in 1982 failed to give [exculpatory] evidence to prosecutors did not themselves violate a clearly established constitutional right," *see maj. op.* at 15, and *Goodwin*, holding that police officers who failed to perform the same duty in 1983 *did* violate a clearly established right. Of course, no such case exists. A criminal defendant's constitutional right to have the police turn over material, exculpatory evidence to the prosecutor has been clearly established in this circuit since at least 1964.

> [I]t makes no difference if the withholding [of exculpatory evidence] is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were

> guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court *and the defendant*.

Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964) (emphasis added) (footnote omitted).

The majority believes that, in 1982, the law of this circuit held that if a police officer withheld exculpatory evidence from a criminal defendant, this misconduct was not a direct constitutional violation, but rather, was "imputed to" the prosecutor. The majority's "imputed to" theory is an elaborate legal fiction that emanates from a footnote in our decision in *United States v. Sutton*, 542 F.2d 1239, 1241 n.2 (4th Cir. 1976). The majority creates this "imputed to" legal fiction based on a single footnote in *Sutton*, ignoring this court's clear holdings in *Barbee* and its progeny. The majority ignores *Barbee's* plain statement that the police misconduct at issue in this case practices a deception "not only" on the prosecutor, but on the court "and the defendant." *See Barbee*, 331 F.2d at 846. The most logical and consistent interpretation of this court's precedent suggests that Jean's right to material, exculpatory evidence has been clearly established since our decision in *Barbee*.

More importantly, if a police officer's misconduct was "imputed to" the prosecutor in 1982, the majority fails to explain at what point since 1982 we rejected the "imputed to" analysis. The majority recognizes that our circuit has recently upheld § 1983 judgments against

police officers who withheld material, exculpatory evidence from a criminal defendant. *See maj. op.* at 15 n.3. This means that a police officer's withholding of exculpatory evidence is no longer "imputed to" the prosecution for purposes of holding an officer liable under § 1983. The majority points to no authority to explain how this kind of police misconduct was "imputed to" the prosecutor in 1982, but is now its own direct violation of a criminal defendant's constitutional rights.

The simple answer here is that no authority exists to explain this change because the change never occurred in the first place. At least since *Barbee* in 1964, a reasonable police officer in North Carolina would have known that a criminal defendant has a clearly established right to have officers deliver material, exculpatory evidence to prosecutors. For that reason, the officers in this case are not entitled to qualified immunity for their misconduct.

III.

According to the majority, holding Collins and Shingleton liable for the violation of Jean's constitutional rights would make them scapegoats. Nothing could be further from the truth – the real scapegoat in this matter is Lesly Jean. Jean spent nine years in prison for a crime he did not commit because police officers used "hypnosis" to alter the description of the perpetrator of this crime so that it matched Jean's appearance and his clothes.

The officers in this case are not scapegoats. To the contrary, they are without doubt responsible for the

mockery of justice that resulted in Jean's nine-year confinement. As I have argued, the question before us is whether a reasonable police officer would have known in 1982 that concealing evidence from the prosecutor violated the constitutional rights of a criminal defendant. While qualified immunity should be invoked in every case in which an officer's conduct was arguably within the bounds of the law, in this case no such argument can be made. The officers' conduct in the prosecution of Jean was reprehensible and a total betrayal of the trust that society places in those whom it empowers to enforce the law. That Jean will not be allowed the opportunity to present his claim to a jury only perpetuates the injustices that have befallen him in the legal process, and I respectfully dissent. Judges Murnaghan, Hamilton, Michael, and Motz join in this dissent.

HAMILTON, Circuit Judge, dissenting:

The major theme of the majority's opinion is "No Case on Point!" That is, the majority leaves no doubt that, to avoid the qualified immunity gauntlet, a § 1983 plaintiff must demonstrate that in a prior case decided by the Supreme Court, this court, or the highest court of the state in which the case arose, the conduct engaged in by the government official was held to be constitutionally unlawful. The "No Case on Point" doctrine makes a mockery of the Supreme Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Anderson*, the Supreme Court explicitly held that a § 1983 plaintiff need not show that in a prior case the government official's actions were held to be constitutionally unlawful. *Id.* at 640. Because the majority fails to follow *Anderson*, I dissent.

Qualified immunity turns on whether, at the time of the government official's conduct, the actions of the government official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Anderson*, 483 U.S. at 640. In other words, the government official's action in question need not have previously been found to be unlawful, *see id.*; rather, "in light of pre-existing law the unlawfulness must be apparent," *id.*

At the time of Shingleton and Collins' actions in 1982, our case law clearly established that a defendant's due process rights were violated when the police concealed material exculpatory evidence. *See Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964); *see also Boone v. Paderick*, 541 F.2d 447, 450-51 (4th Cir. 1976) (holding that duty to disclose not "neutralized because [evidence] was in the hands of the police rather than the prosecutor"). As we noted in *Barbee*:

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposefully, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without ever informing him of other evidence in their possession which

> contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. . . .

331 F.2d at 846 (footnote omitted).

In holding that Shingleton and Collins are entitled to qualified immunity, the majority first posits that a reasonable officer in 1982 would not have known that withholding material exculpatory evidence violated Jean's constitutional rights. This proposition is tomfoolery. *Barbee* established the proposition that a criminal defendant has the constitutional right to have the police disclose material exculpatory evidence. *Id.* In cases post-*Barbee*, we have consistently held that a police officer can be liable under § 1983 for the failure to disclose material exculpatory evidence. *See Taylor v. Waters*, 81 F.3d 429, 436 n.5 (4th Cir. 1996); *Carter v. Bunch*, 34 F.3d 257, 264 (4th Cir. 1992); *Goodwin v. Metts*, 885 F.2d 157, 162-63 (4th Cir. 1989), *overruled in part by Albright v. Oliver*, 510 U.S. 266 (1994). Because there have been no cases since *Barbee* altering the longstanding principal [sic] that a police officer has the duty to disclose material exculpatory evidence, Shingleton and Collins are not entitled to qualified immunity.

The majority does explain in a footnote what it would take to make the unlawfulness of Shingleton and Collins' actions "apparent." The majority posits that our decisions in "*Taylor, Carter,* and *Goodwin* now provide notice to police officers that they can be subject to monetary damages under section 1983 for failure to disclose exculpatory evidence to the prosecutor." *Ante* at 15 n.3. Thus, according to the majority, a case on point is required to provide the necessary notice to police officers

before they can be liable under § 1983. This is precisely what *Anderson* says is forbidden. *See* 483 U.S. at 640.

Perhaps an even more fundamental problem with the majority's analysis is its failure to explain why the unlawfulness of the conduct of the officers was apparent to the officers in *Goodwin* (where the officers' actions occurred in 1983), but was not apparent to Shingleton and Collins in 1982. Judge Ervin correctly points out that there was no intervening decision between 1982 and 1983 that would have made the officers in *Goodwin* more aware of their unlawfulness than Shingleton and Collins. *See ante* at 23-25. Thus, in the absence of an intervening decision, there is no rational way to square the reasoning of *Goodwin* – that a police officer is not entitled to qualified immunity for his failure to disclose material exculpatory evidence, if his actions occurred in 1983 – with the reasoning of the majority – that a police officer is not entitled to qualified immunity for his failure to disclose material exculpatory evidence, if his actions occurred in 1982. This point is important because it illustrates the dramatic shift in our qualified immunity jurisprudence. Whereas a case on point was not required when *Goodwin* was decided, now one is. And such "case on point" decisionmaking is patently at odds with *Anderson*.

In a last ditch effort to find qualified immunity, the majority also posits that a reasonable officer would not have known that withholding exculpatory evidence in the form of statements given under hypnosis violated Jean's constitutional rights. This rationale is even more absurd than the first one served up by the majority. Suffice it to say that exculpatory evidence is exculpatory evidence.

The nature of the exculpatory evidence is simply irrelevant. To hold otherwise would turn *Brady v. Maryland*, 373 U.S. 83 (1963), on its head.

It follows that I would reverse.

Judge Murnaghan joins in this dissent.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LESLY JEAN, *Plaintiff-Appellant,*	)	
v.	)	No. 95-7694
DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually. *Defendants-Appellees.*	)	107 F.3d 1111 (4th Cir. 1997)

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. Malcolm J. Howard, District Judge. (CA-94-62-4-H2)

Argued: September 27, 1996
Decided: March 7, 1997

Before ERVIN and HAMILTON, Circuit Judges, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Ervin wrote the opinion, in which Judge Spencer joined. Judge Hamilton wrote a concurring opinion.

COUNSEL

ARGUED: Rebecca J. Britton, BEAVER, HOLT, RICHARDSON, STERNLICHT, BRUGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant, Kenneth Ray Wooten, WARD & SMITH, P.A., New Bern, North Carolina, for Appellees. **ON BRIEF:** Richard B. Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BRUGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant. John R. Green, Jr., WARD & SMITH, P.A., New Bern, North Carolina, for Appellees.

OPINION

ERVIN, Circuit Judge:

Lesly Jean (Jean) appeals from an order of the district court dismissing his case with a grant of summary judgment. For the reasons set forth below, we vacate the grant of summary judgment and remand for further proceedings in the district court.

I

Jean brought suit against Captain Delma Collins (Collins), Chief of Detectives of the City of Jacksonville, and Officer James Shingleton (Shingleton), a police officer with the city, for malicious prosecution, false arrest, arrest absent probable cause, and violation of Jean's due process right under *Brady v. Maryland*, 373 U.S. 83 (1963), to have exculpatory evidence disclosed to defense counsel during a criminal prosecution. These claims were brought pursuant to 42 U.S.C. § 1983 and state law. The state law claims were dismissed prior to the summary judgment

stage, and because Jean does not appeal their dismissal, they are not at issue here. Jean's § 1983 claims are related to the government's use of hypnotically-enhanced testimony at Jean's criminal trial for rape and to the prosecution's failure to fully disclose exculpatory evidence related to the hypnosis.

The district court granted defendants' motion for summary judgment on the § 1983 claims for several reasons. In his appeal Jean assigns error only to the district court's determination that, as a matter of law, defendants are entitled to qualified immunity on the *Brady* issue because Jean's right to have the government disclose the evidence regarding the hypnotically-enhanced testimony was not clearly established in 1982. Our review of this grant of summary judgment based on a finding of qualified immunity is *de novo* because it is a matter of law. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir.1992).

II

On July 21, 1982, Kathleen Wilson (Wilson) was brutally raped and beaten at her home in the early morning. A police officer arrived, took a very brief description of the perpetrator, and immediately broadcast it on the police radio. Patrolman Shingleton, a defendant in this case, heard the broadcast and stopped a man walking along the highway who fit the description. After a brief encounter, the man fled and was not found again. Later that morning, Shingleton described the man he had seen, but he was unable to provide much detail. At the hospital shortly after the attack, Wilson provided police with a description of her attacker and worked with a sketch

artist to create a likeness of the perpetrator. The description provided by Wilson did not match, in many respects, that provided by Shingleton.

The next day Collins, then head of the detective division and a defendant in the instant case, decided to hypnotize Shingleton to enhance his memory of the encounter with the suspect on the street. Apparently both officers knew the content of Wilson's description and knew that it differed from Shingleton's description, but it is unclear whether they had also both seen the composite sketch prepared by Wilson and the sketch artist. Collins' formal instruction in hypnosis consisted of a two-week training course; he had conducted several hypnoses for the department and he read publications about hypnosis as an investigative technique. Despite his training, Collins did not take detailed notes or record the hypnosis. He only recorded in his log that the description given by Shingleton after the procedure matched the one given by Wilson.

A few days after the attack a police officer in a donut shop encountered Jean, a marine stationed at the military base near Wilson's apartment, and the plaintiff in this case. Believing that Jean resembled one of the descriptions, the officer called Shingleton. Shingleton identified Jean as the man he had seen on the roadside, and he testified later that he was able to identify Jean due to the hypnosis. Jean was placed under arrest.

Officer Smith, another officer working on the investigation, showed Wilson a photo lineup with five pictures, one of which was Jean's. She stated that none of the pictures were of her assailant, but said that one photo –

not Jean's – made her uncomfortable. The next day she telephoned the officer and asked to see the photo lineup again. This time Wilson said that Jean's eyes made her feel ill, but she did not say that Jean had been her attacker.

At this point Collins and Shingleton decided to hypnotize Wilson to enhance her ability to identify her perpetrator's photo.[1] The actual hypnosis was audiotaped, but not the pre- or post-hypnotic conversations and descriptions. Officer Collins did fill out worksheets prior to and after the hypnosis.

In the weeks following the hypnosis, Wilson listened to voice exemplars and, after a week's delay and several play-backs, tentatively selected Jean's voice. Wilson also picked Jean out of a three-person lineup.[2]

Prior to Jean's trial for rape and sexual assault, his attorneys timely filed a discovery motion requesting, among other things, disclosure of "facts and circumstances" surrounding any pre-trial identification; inspection of recordings tangible to the preparation of his defense; and results and reports of any physical examinations, tests, measurements, and experiments made in connection with the case. Despite this motion, the state did

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[1] The hypnosis itself was very suggestive, and during the procedure the officers effectively persuaded Wilson that Jean could have been her assailant. However the validity of the procedure itself is not at issue today, but only the exculpatory nature of evidence regarding the procedure.

[2] These two identification procedures were also highly suggestive and unreliable in several respects, but are not in and of themselves at issue in this case.

not inform Jean's counsel that the victim had ever seen Jean's photograph prior to the lineup, or that Wilson or Shingleton had ever been hypnotized. Moreover the state did not disclose any of the documentation of the hypnoses and how the descriptions had been affected by them. Not until the victim had testified on direct examination during the trial did Jean's counsel learn of the hypnosis. Even after counsel discovered the hypnosis and requested all records and recordings relating to the procedures, the state still refused to disclose the requested material, denying that any records existed.

The jury returned guilty verdicts against Jean on all counts, and he was sentenced to two consecutive life sentences. After exhausting his appeal of right at the state level, and filing for writs of habeas corpus in state courts and in a federal district court, his case came before us. In 1991, we reversed the decision of the district court denying habeas relief and found that the state's failure to turn over evidence relating to the hypnosis and other identification procedures violated *Brady v. Maryland*, 373 U.S. 83 (1963). *Jean v. Rice*, 945 F.2d 82 (4th Cir.1991) (per curiam). We further found that the evidence at issue had certainly been material, as most of the non-identification evidence presented at trial tended to exculpate rather than implicate Jean. *Id.* at 87. On that basis we vacated Jean's conviction and remanded for further proceedings. The state declined to try Jean again, and he was released after serving nine years in prison.

III

A government official is entitled to qualified immunity from civil liability under § 1983 when his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir.1996); *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir.1995) (en banc), *cert. denied*, 116 S.Ct. 530 (1996); *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir.1992).

The first step in assessing whether a particular official is entitled to qualified immunity involves identification of the specific right which the official allegedly infringed. *Taylor*, 81 F.2d at 433; *Pritchett*, 973 F.2d at 312. A court must next determine whether the right was clearly established at the time of the alleged violation. *Pritchett*, 973 F.2d at 312. These two inquiries are exclusively legal ones. *Id.* If the first two criteria are met, it must next be decided whether a reasonable person in the officer's position would have known that his or her actions would violate the right. *Id.* This assessment involves application of an objective test to the particular facts of the case, and jury determinations may be required to settle disputed aspects of those facts. *Id. See also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). We will address each element of the three part test for qualified immunity in turn; if Jean is able to satisfy each prong of the test then Collins and Shingleton are not entitled to qualified immunity from suit.

A

With respect to the first prong of the test, Shingleton and Collins vigorously argue that Jean has not properly identified the constitutional right violated by the state's failure to disclose the evidence at his trial. We find this argument to be unpersuasive. In our decision to vacate Jean's conviction on habeas review, we plainly held that the state's failure to comply with *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny violated Jean's constitutional rights. *Jean v. Rice*, 945 F.2d at 87. Both the Supreme Court and this Circuit, when addressing *Brady* issues, have grounded a defendant's right to exculpatory evidence in the Due Process Clause of the Fourteenth Amendment. *See, e.g., Brady*, 373 U.S. at 85; *Wise v. Warden, Maryland Penitentiary*, 839 F.2d 1030, 1033 (4th Cir.1988); *Boone v. Paderick*, 541 F.2d 447, 448 (4th Cir.1976), *cert. denied*, 430 U.S. 959 (1977). More than three decades ago we held that failure of the police to disclose impeachment evidence involves a "question of fundamental fairness rising to the level of constitutional due process which cannot be brushed aside as a mere error in evidentiary ruling." *Barbee v. Warden*, 331 F.2d 842, 847 (4th Cir.1964).

Shingleton and Collins further argue that the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994), means that Jean cannot vindicate his *Brady* violation through the Fourteenth Amendment. We disagree with this reading of *Albright*. *Albright* is an admittedly confusing decision because it lacks a majority

opinion; instead it has one plurality and several concurring and dissenting opinions. However, perhaps its clearest, most relevant holding is found in the plurality opinion of Chief Justice Rehnquist:

> When a particular provision of the Bill of Rights has been made applicable to the states by the Fourteenth Amendment, and when it provides an explicit source of constitutional protection against a particular sort of government behavior, that amendment and not a more generalized notion of substantive due process must be the guide for analyzing claims.

Id. at 813.

Albright does not preclude Jean's cause of action because the right to disclosure of exculpatory evidence is grounded directly in the Due Process Clause itself. *See Brady*, 373 U.S. at 85 ("We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment."). Language used by Justice Stevens in his dissent in *Albright* suggests strongly that *Brady* and *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), are examples of the sorts of liberty protections which go beyond the strictly procedural and are therefore properly within the domain of substantive due process. *Albright*, 510 U.S. 266, 299, & n.15 (Stevens, J., dissenting). "Our cases make clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused." *Id.*

We have already recognized that *Albright* does not preclude causes of action grounded directly in the Fourteenth Amendment. In *Taylor v. Waters*, 81 F.3d 429 (4th Cir.1996), we stated in a footnote that *Albright* did not change the fact that an officer's failure to disclose exculpatory evidence deprives a defendant of his or her due process right to a fair trial and can be actionable under § 1983. *Id.* at 436 n.5. Specifically, we stated that while *Albright* rendered part of our previous holding in *Goodwin v. Metts*, 885 F.2d 157 (4th Cir.1989), *cert. denied*, 494 U.S. 1081 (1990), invalid, it did not affect the portion of our holding which allowed a § 1983 claim for a *Brady* violation. For these reasons, Shingleton and Collins are mistaken to rely on *Albright* in the instant case.

We find that Jean has properly grounded his instant claim in the Due Process Clause of the Fourteenth Amendment and that he has satisfied the first prong of the test to determine whether Shingleton and Collins are immune from suit.

B

In deciding whether Shingleton and Collins are entitled to qualified immunity we must next determine whether the specific right infringed was clearly established in 1982. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir.1992). "In determining whether the specific right allegedly violated was 'clearly established,' the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Id.; see also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Gooden v. Howard*

County, Md., 954 F.2d 960, 968 (4th Cir.1992) (en banc). We must, however, strike a balance and avoid defining the right so narrowly, in a manner which is so dependant upon the facts of this very case, that qualified immunity is virtually guaranteed. "Of course, 'this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.' " *Gooden*, 954 F.2d at 968 (quoting *Anderson v. Creighton*, 483 U.S. at 640).

The district court determined that disclosure of hypnosis-related evidence was not a clearly established right in 1982. Shingleton and Collins, together with the district court suggest that while exculpatory evidence had to be disclosed as early as *Brady*, impeachment evidence is much different and the requirement of its disclosure did not arise until 1985. We find this analysis to be incorrect for two reasons. First, we believe that appellees draw an artificial bright-line between impeachment and exculpatory evidence. They fail to recognize that the evidence that the eyewitnesses against Jean had their memories enhanced and influenced by hypnosis has both exculpatory and impeachment implications. Certainly the hypnosis could have been used to provide material for cross-examination of the eye-witnesses. It could also have been used to show that, prior to the suggestive procedures, the descriptions given by the witnesses were of a person other than Jean. This aspect makes the evidence exculpatory and not merely relevant for impeachment.

More importantly, disclosure of even purely impeachment evidence was required well before 1982.

The Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150, made clear in 1972 that evidence tending to cast doubt upon the credibility of a government witness should be disclosed under *Brady*:

> Thereafter *Brady v. Maryland* held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.

Id. at 153-54 (citations omitted). In *Giglio* the Court went on to find that evidence that a key government witness had been offered immunity from prosecution for his testimony had sufficient bearing on that witness' credibility, and was certainly material to the determination of defendant's guilt, and therefore it should have been disclosed to the defense. *Id.*

Several cases which followed *Giglio* confirm that it in fact established the right to disclosure of credibility evidence. In *Boone v. Paderick*, 541 F.2d 447 (4th Cir.1976), *cert. denied*, 430 U.S. 959 (1977), we found that the existence of a cooperation agreement with a prosecution witness was clearly relevant to the credibility of that witness; that the jury might not have convicted the defendant if they had reason to doubt the credibility of the government's main witness; and that failure to disclose such evidence was a violation of *Giglio* and *Brady*. *Id.* at 448-49. *See also Campbell v. Reed*, 594 F.2d 4 (4th Cir.1979).

Shingleton and Collins raise two arguments attempting to refute the pre-1982 precedent on this issue. They

first argue that there was no holding specifically affirming the impeachment value of evidence of hypnosis. The very behavior at issue, however, need not have been specifically addressed by a court for the right to be free from that behavior to have been clearly established. *Gooden*, 945 F.2d at 968. Moreover, as early as 1969, courts in other jurisdictions had found a duty to disclose evidence relating to hypnosis. In 1969, Judge Friendly of the Second Circuit, granted a new trial in a case in which the prosecutors failed to disclose that the main witness had been hypnotized during the pre-trial investigation. *United States v. Miller*, 411 F.2d 825, 832 (2d Cir.1969). The reversal was required despite the fact that the hypnosis itself closely followed procedure and was not at all suggestive. *Id.* at 828-29. Similarly, in 1975, a federal district court in Georgia considered evidence relating to hypnosis and found it to be relevant to credibility and therefore covered by *Giglio* and *Brady*. *See Emmett v. Ricketts*, 397 F.Supp. 1025, 1039-40 (N.D.Ga.1975). In that case, as in the instant one, there was almost no evidence other than the one witness' testimony that tended to suggest that the defendants were guilty, and the government failed to turn over the records of the hypnosis of that witness. *Id.* The district court found that "[h]er credibility was the pivotal issue in these cases and the Hall [hypnotist] materials were absolutely essential to a fair appraisal of the credibility of the state's critical witness." *Id.* at 1040-41. Shingleton and Collins attempt to distinguish *Emmett* by arguing that the evidence in that case was relevant because the witness had stated, during hypnosis, that someone other than the defendant was responsible for the crime. This is not an accurate assessment of *Emmett*. In

fact, the evidence was relevant because it showed a witness whose story changed greatly over time, and who was particularly influenced by hypnosis; this alone made the court seem very certain that the defense was entitled to the tapes and documents relating to the hypnosis. The court described the evidence as relevant to credibility, not as exculpatory, but still found that it should have been disclosed under *Giglio*. *Id.*

Shingleton and Collins next argue that not until the Supreme Court's decision in *United States v. Bagley*, 473 U.S. 667 (1985), was the right of access to impeachment evidence clearly established. This is simply not correct. In fact the *Bagley* court cited *Giglio* for its rule that impeachment evidence as well as exculpatory evidence is covered by *Brady*. *Id.* at 676. *Bagley* did not create the duty to disclose evidence, but instead merely refined the contours of the rule. The *Bagley* Court clarified the materiality requirement for reversal for a *Giglio* violation, and created the rule that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Prior to *Bagley*, it seems that, if anything, the test for materiality was less stringent and more infractions were found to mandate reversal of a guilty verdict. It cannot be said that, absent *Bagley*, appellees had no reason to know that evidence regarding identification procedures and hypnosis that cast doubt upon the defendant's guilt should be disclosed to the defense. It is noteworthy that our decision in *Jean v. Rice*, which resulted in Jean's release from prison, cited

Giglio, and not *Bagley*, for the proposition that the evidence in question should have been disclosed. 945 F.2d at 87 n.9.

Evidence exculpating the defendant, evidence establishing a motive to lie, and evidence of prior inconsistencies in witness statements were all subject to *Brady* and *Giglio*'s disclosure requirements in 1982. As we ruled in *Jean v. Rice*, the evidence in Jean's case should, without a doubt, have been turned over to the defense. The documents and tapes reflected numerous inconsistencies in identifications, both over time and between witnesses. The evidence further revealed the victim's inability to select defendant's photo from a lineup until she underwent a very suggestive hypnosis, and showed that the victim had in fact been shown a photo of Jean prior to identifying him in a live lineup when no other members of the lineup had been seen previously. These facts are all obviously relevant to whether Wilson's and Shingleton's identifications of Jean should have been relied upon by the jury. Likewise, even though the suggestive nature of the hypnosis of Wilson may not have rendered it inadmissible under North Carolina law regarding hypnosis at the time, it still might have inspired doubt in the minds of the jury about the validity of her post-hypnosis recollections. We conclude that, in 1982, appellees were under a clearly defined constitutional duty to disclose evidence relating to the hypnosis to Jean's counsel. Summary judgment of this case on qualified immunity grounds was therefore inappropriate.

C

The third factor in determining whether Jean has shown that Collins and Shingleton are not entitled to qualified immunity is whether a reasonable person in the position of the defendant would have known that his behavior would violate the right at issue. *Pritchett v. Alford*, 973 F.2d at 312. One specific consideration relevant to this prong in the instant case is whether the officers in fact informed the district attorney about the existence of the evidence. The district attorney denies having had any knowledge of the existence of documentation of the hypnoses until after trial, but Shingleton and Collins state that they informed the prosecutors about the procedures. If the officers did pass on all relevant evidence to the district attorney, then they perhaps fulfilled their duty, and the burden fell to the district attorney to disclose the evidence to Jean's attorney. Questions, such as this one, involved in the third prong of qualified immunity present mixed issues of law and fact and may require trial by a jury or by the district court. We therefore remand so that the district court may address these issues.

IV

Shingleton and Collins raise two additional arguments in their brief challenging both Jean's initial complaint and his appeal. Neither of these arguments is persuasive.

The appellees first argue that, as a matter of law, Shingleton is entitled to absolute immunity as a witness and should not be subjected to suit. This argument is

without merit. Jean is not suing Shingleton for his testimony and behavior on the stand, but rather for his behavior during the investigation and trial preparation for Jean's trial; therefore, witness immunity does not protect him. The case upon which Shingleton relies for the assertion that even police officers are entitled to immunity from suit when they are witnesses, *Briscoe v. LaHue*, 460 U.S. 325 (1983), involves suit for the officer's perjury *on the stand*. The *Briscoe* Court mentioned in passing that police officers receive only qualified immunity for performance of their duties other than testifying in court. *Id.* at 342. Despite Shingleton's mischaracterization of *Briscoe*, that case simply does not suggest that witness immunity protects witnesses from suit for actions other than their courtroom testimony. We are persuaded by the cogent reasoning of one district court which has addressed this issue. *Walker v. Tyler Cty. Comm'n*, 886 F.Supp. 540, 549 (N.D. W. Va. 1995). In *Walker* the district court found that a medical examiner was entitled to absolute immunity from civil liability for allegations that he had lied on the stand. *Id.* However, the court also found that the defendant was entitled to neither prosecutorial nor qualified immunity for withholding exculpatory evidence. *Id.* at 546-47. Shingleton is similarly not entitled to immunity from suit for his role in this investigation simply because he was later a witness.

Shingleton and Collins finally argue that Jean's claims are time barred, relying upon *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 182-83 (4th Cir.1996), to support this assertion. *Brooks* states that claims relating to lack of probable cause for a warrantless arrest begin to accrue at the time of the arrest rather than when the

eventual conviction is overturned or dismissed. *Id.* at 183. However, *Brooks* specifies that this analysis applies only when the alleged § 1983 violation does not implicate the validity of the conviction or sentence. *Id.* at 182-83. The Supreme Court in *Heck v. Humphrey* stated that when the damages are for "unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the plaintiff must show that the conviction has been reversed, vacated or otherwise called into question by a court. 114 S.Ct. 2364, 2372 (1994). The cause of action in such cases, therefore, cannot accrue until after the reversal of the underlying conviction. Jean's claim of damage from *Brady* and *Giglio* violations did not arise until his criminal case was dismissed, and it is not time-barred.

V

For the foregoing reasons, we reverse the court's grant of summary judgment in favor of Shingleton and Collins, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

HAMILTON, Circuit Judge, concurring in the judgment:

The issue presented in this appeal is straightforward: whether, at the time of their conduct, the actions of Shingleton and Collins violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S.

800, 818 (1982). At the time of their actions, *Brady* and its progeny made clear that a defendant's due process rights were violated when the prosecution failed to disclose material exculpatory or impeachment evidence to the defense, regardless of whether the prosecutor acted in bad faith or even knew of the evidence. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Although the Supreme Court has not explicitly addressed the disclosure duties of police under *Brady*, our case law at the time of Shingleton and Collins' actions clearly established that a defendant's due process rights were violated when the police concealed material exculpatory or impeachment evidence. *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir.1964); *see also Boone v. Paderick*, 541 F.2d 447, 450-51 (4th Cir.1976) (duty to disclose not "neutralized because [evidence] was in the hands of the police rather than the prosecutor"), *cert. denied*, 430 U.S. 959 (1977).[1] As the *Barbee* court explained:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposefully, or negligently, withheld. And it makes no difference if the

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[1] We have recognized that a police officer's failure to disclose exculpatory evidence that should have been disclosed under *Brady* is cognizable under § 1983. *See Carter v. Burch*, 34 F.3d 257, 263-64 (4th Cir.1994) (affirming jury verdict against police officer for withholding exculpatory evidence that should have been disclosed under *Brady*), *cert. denied*, 115 S.Ct. 1101 (1995).

> withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without ever informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. . . .
>
> The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

331 F.2d at 846 (footnote omitted).

Accordingly, this case boils down to whether a reasonable officer in Shingleton and Collins' position would have known, when he/they acted, that the exculpatory and impeachment evidence allegedly withheld from the prosecutor was material. At the time of Shingleton and Collins' actions, the materiality standard set forth in *United States v. Agurs*, 427 U.S. 97 (1976), governed. The Court in *Agurs* distinguished between three situations in which a *Brady* claim might arise: (1) where the prosecutor introduced testimony that he knew or should have known was false; (2) where the government failed to disclose a specific kind of exculpatory or impeachment evidence requested by the defendant; and (3) where the government failed to disclose exculpatory or impeachment evidence never requested, or requested in a general way. Under the false testimony standard, the Court noted

that it had consistently set aside convictions obtained by the knowing use of false testimony when there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103 (footnote omitted). Under the specific request scenario, the Court noted that when the government failed to disclose a specific kind of exculpatory or impeachment evidence requested by the defendant, that failure, was "seldom, if ever, excusable." *Id.* at 106. The Court went on to hold that under the no/general request scenario, the government failed in its duty to disclose when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 108. In other words, if the undisclosed evidence created "a reasonable doubt that did not otherwise exist," there was constitutional error. *Id.* at 112.[2]

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[2] The materiality standard was modified in subsequent Supreme Court cases. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court disavowed any difference between exculpatory and impeachment evidence and abandoned the distinction between the second and third *Agurs* scenarios. In *Bagley*, the Court held that evidence was material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682 (opinion of Blackmun, J.); *Id.* at 685 (White, J., concurring in part and concurring in judgment). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome [of the trial.]" *Id.* at 682. Following *Bagley*, the Court has consistently adhered to the *Bagley* standard. *See, e.g., Kyles v. Whitley*, 115 S.Ct. 1555, 1566 (1995) ("A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " (quoting *Bagley*, 473 U.S. at 678)).

In my opinion, at the time of Shingleton and Collins' actions, a reasonable officer would have known that the evidence allegedly withheld would have created "a reasonable doubt that did not otherwise exist." *Id.* To appreciate and understand the significance of the audio recordings and the accompanying reports of the hypnosis of Wilson and Shingleton, it is crucial to recognize that the state's case hinged on the identification of Jean by Wilson and Shingleton. As we recognized in our earlier opinion:

> [T]here was little independent corroborating evidence to sustain Jean's conviction: there were no fingerprints or matching pubic hairs; the blood/semen test only placed Jean in the same 32% as the rapist; and the voice exemplar was of dubious quality, had only one black voice on it, and presented difficulty to Ms. Wilson, causing her to take one week to make her identification.

Jean v. Rice, 945 F.2d 82, 87 (4th Cir.1991). Because there was little independent evidence of guilt outside the inconclusive identification evidence, a reasonable officer would have known that the audio recordings and accompanying reports of the hypnosis of Wilson and Shingleton would have created "a reasonable doubt that did not otherwise exist." *Agurs*, 427 U.S. at 112. Indeed, it cannot be denied that the audio recordings and the accompanying reports of the hypnosis of Wilson and Shingleton contained numerous inconsistencies with previous descriptions of the assailant and that the hypnotic techniques were suggestive. For example, as to Shingleton, under hypnosis, the stripe on the t-shirt became a sweatmark, and the mustache disappeared. In addition, Shingleton recalled white shoelaces and striped socks under

hypnosis, but Jean's shoelaces were black and his socks had no stripes. Finally, he recalled glassy eyes under hypnosis despite his earlier statement that he could not see the suspect's eyes. Along a similar vein, Wilson's inability to identify Jean as the assailant until after she underwent a very suggestive hypnosis made the audio recordings and the accompanying reports of the hypnosis all the more critical. All of this evidence not only was critical to impeach the testimony of Wilson and Shingleton, but it strongly suggested that someone else committed the crime. In short, the audio recordings and the accompanying reports of the hypnosis went directly to the heart of the state's case – whether Jean, as opposed to someone else, committed the crime – and should have been disclosed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:94-CV-62-H2

LESLY JEAN, Plaintiff, v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Individually, Defendants.	)	ORDER

This matter is before the court on defendants' motion for summary judgment. Plaintiff initiated the underlying action in this case on May 20, 1994, alleging damages arising from the violation of his due process and fourth Amendment rights. Plaintiff's complaint also asserts state law claims for negligent and intentional infliction of emotional distress and malicious prosecution. These state law claims were dismissed by the court in an order filed on February 16, 1995. Consequently, the only claims presently before the court are the allegations concerning the plaintiff's constitutional rights. The parties have thoroughly briefed this matter and the claims are ripe for disposition.

Statement of the Case

On December 5, 1982, the plaintiff, Lesly Jean ("Jean"), was convicted of rape and sexual assault after a trial by jury. Upon exhausting his state court appeals, Jean filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina (the "District Court"). The District Court, the Honorable Terrence William Boyle presiding, denied the plaintiff's petition. However, the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals") reversed and remanded the case with instructions that a writ be issued. *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991). Upon remand, the prosecution decided not to retry the case and Jean was subsequently released from prison.

Jean's habeas corpus petition was granted by the Court of Appeals on the grounds that audio tapes and accompanying records of hypnotically induced testimony "should have been disclosed to defense counsel, and that the government's failure to do so was a violation of the principles announced in *Brady* and its progeny." *Id.* at 87. The specific facts upon which this conclusion was based are thoroughly set forth in the Court of Appeals' opinion referenced above. These facts are also summarily repeated in this court's earlier order of February 16, 1995, denying in part and granting in part the defendants' motion to dismiss. Consequently, although the facts are important to the disposition of this matter, the court feels that they have been sufficiently expressed in the previous two orders and for that reason they will not be repeated here.

DISCUSSION

Jean's present action was initiated on May 20, 1991, pursuant to 42 U.S.C. § 1983. Jean claims the same actions that were found to warrant habeas corpus relief also entitle him to monetary damages under § 1983. Jean's first claim for relief is premised upon the due process clause. His second claim for relief is premised upon an alleged lack of probable cause under the Fourth Amendment. The defendants, sued in their individual capacity for actions committed as employees of the City of Jacksonville, assert that they are entitled to summary judgment based on the defense of qualified immunity.

1. Summary Judgment

Summary Judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). When making the summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-movant. *Anderson*, 477 U.S. at 255.

Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio*

Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 250. The moving party can bear his burden either by presenting affirmative evidence, or by demonstrating that the non-movant's evidence is insufficient to establish his claim. *Celotex Corp.*, 477 U.S. at 331 (Brennan, J., dissenting).

2. Qualified Immunity

Public officials, sued for damages in their individual capacities, may be entitled to summary judgment on the basis of qualified immunity. Such officials "generally are shielded from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test for determining the availability of the qualified immunity defense is the "objective reasonableness" of the official's actions. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Although it is not necessary for the right asserted to have been recognized in the precise factual context, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Id.* at 640. *See also Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("The right of the plaintiff must be established so clearly that a reasonable official would know what he is doing violates that right.")

In light of the qualified immunity standard discussed above, the question presently before the court is whether

Jean's now established right to hypnotized testimony and related records was clearly established under the particular circumstances confronting the defendants at the time of their questioned actions. *See Slattery,* 939 F.2d at 216. The court must therefore begin its analysis by looking to the law regarding hypnotized testimony as it existed in 1982, the date of Jean's trial.

3. Was Hypnosis an Accepted Investigation Technique in 1982?

In 1982, hypnosis appears to have been a generally accepted method of police investigation in North Carolina. In fact, it was not until 1984 that the North Carolina Supreme Court ruled that hypnotically refreshed testimony was inadmissible in court. *State v. Peoples,* 311 N.C. 515, 319 S.E.2d 177 (1984). Moreover, the Court of Appeals has not yet adopted a *per se* rule against the admissibility of such testimony and presently allows the testimony as long as certain safeguards are met. *Harker v. Maryland,* 800 F.2d 437 (4th Cir. 1986).

In a sworn affidavit attached to the motion for summary judgment, defendant Shingleton states that at the time of Jean's investigation he and other law enforcement officials thought hypnosis to be "highly effective." Aff. at 3. Defendant Collins states, also in a sworn affidavit, that he had received extensive hypnosis training from the State of North Carolina at its Justice Academy in Salemburg. Aff. at 1. Collins also discusses other hypnosis he had performed and the fact that hypnosis appeared to him to be a regularly accepted scientific method of police investigation. Aff. at 1-3.

In light of the sworn statements of the two defendants, it appears to this court that the defendants had no reason to question their use of hypnosis as an investigative technique. It also seems highly unlikely that the Justice Academy would train its officers in hypnosis if hypnosis was not commonly accepted at the time. The court therefore finds that both Collins and Shingleton were reasonable in believing that hypnosis could properly be used to aid them in their investigation of Jean. The question still remains, however, whether the defendants should have known that hypnotically induced testimony and related records were the type of evidence subject to disclosure to the defense.

4. Should the Defendants Have Known in 1982 that Hypnosis Testimony and Related Records Needed to be Made Available to the Defense?

As of 1982, the primary case regarding the suppression of evidence was the United States Supreme Court case of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 86. It was not until 1985, however, that the Supreme Court expanded upon its *Brady* decision so as to make clear that impeachment evidence, as well as exculpatory evidence, falls within the parameters of evidence that must be made available to the defense. *U.S. v. Bagley*, 473 U.S. 667 (1985).

In *Bagley*, the Supreme Court noted that *Brady* involved a situation in which "the prosecution failed to

disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses." *Id.* at 676. The Court then stated, "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial . . . only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 678. The Court ultimately concluded that under the facts of *Bagley*, "the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination" constituted constitutional error. *Id.* at 678.

The Court's decision in *Bagley*, that the prosecution's failure to disclose impeachment evidence constituted constitutional error, was not a foregone conclusion. In fact, it was only after a thorough discussion of the issue and the particular facts of the case before it that the Court concluded as it did. In the matter presently before the court, the hypnotically induced testimony and related records are clearly impeachment rather than exculpatory evidence. This court has stated before, and the Court of Appeals makes clear in its opinion, that the hypnosis testimony and accompanying records in no way exculpated Jean; rather, they were found to be material because of their potential as a means of discrediting and impeaching the testimony of the victim and defendant Shingleton. *Jean*, 945 F.2d at 87; *Order* at 5 (E.D.N.C. February 16, 1995). The evidence therefore falls under the rule of *Bagley* rather than *Brady*. As *Bagley* was not decided until 1985, it is apparent to this court that it was

not "clearly established" in 1982 that impeachment materials were subject to disclosure.

Moreover, the question before the court today is not whether it was clear in 1982 that impeachment materials *in general* should be turned over to the defense. Rather, the question before the court is whether it was clearly established in 1982 that the hypnotized testimony and related records *of this case* were subject to disclosure under the particular circumstances confronting the defendants at the time of their questioned actions. *See Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991). The *Bagley* decision itself requires one to forecast the effect of the evidence on the trial. In addition, both the Supreme Court of North Carolina and Judge Boyle found no constitutional error in the defendants' actions. *See State v. Jean*, 310 N.C. 157, 311 S.E.2d 266 (1984); *Order* (E.D.N.C. July 6, 1990). If the state supreme court and a learned district court judge found that even under *Bagley* the withholding of hypnotically induced testimony and accompanying records was not a constitutional violation, then certainly the issue cannot be considered clearly established among non-lawyer police authorities before *Bagley* was even decided. It is therefore abundantly clear to this court that it was far from clearly established in 1982 that the materials withheld by the defendants should have been given to Jean's lawyers. Consequently, the court finds that the defendants have successfully asserted the defense of qualified immunity against Jean's claim that their actions violated his due process rights.[1]

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[1] It should also be noted that the defendants did discuss the fact of the hypnosis with the Assistant District Attorney in the

5. The Fourth Amendment Claim

The plaintiff's second claim for relief is premised upon the Fourth Amendment. The Fourth Amendment affords a citizen the right to be free from arrest without probable cause and to be free from unreasonable search and seizure. The standard for determining probable cause "is not defined by bright lines and rigid boundaries." *U.S. v. Williams*, 974 F.2d 480, 481 (4th Cir. 1992). Courts generally describe probable cause as "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). However, the probable cause standard does not require that an officer's belief "be correct or more likely true than false." *Williams*, 974 F.2d at 481.

In applying the defense of qualified immunity to the Fourth Amendment, it has been established that qualified immunity shields an officer from a suit for damages if a reasonable officer could have believed a party's arrest to be lawful, in light of clearly established law and the information in the officer's possession. *Hunter v. Bryant*, 502 U.S. 224, 226 (1991). Furthermore, "[e]ven law enforcement officials who 'reasonably but mistakenly

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case. Also, plaintiff admits that the defendants themselves were never served with any subpoenas or document requests. The nondisclosure of the materials to the plaintiff's lawyer was therefore a prosecutorial decision. Although this does not make the defendants blameless, it does show that they were acting in a manner they thought proper at the time.

conclude that probable cause is present' are entitled to immunity." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Thus, [t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Id.* at 537 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The plaintiff in the matter presently before the court appears to be claiming that he was arrested without probable cause because his identification as a suspect was due in part to an officer's hypnotically induced description. As this court has already stated in its previous order dismissing the plaintiff's malicious prosecution claim, "the wrong upon which Jean relies, suppression of tapes and records of hypnosis, would have provided a basis for attacking the credibility of the hypnotically refreshed identifications. In other words, it weakened, but did not contradict, the circumstances creating probable cause." *Order* at 6 (E.D.N.C. February 16, 1995).

Although the above quoted statement was made in the context of probable cause to prosecute, the court finds the statement to be equally true in the context of probable cause for arrest. Prior to the plaintiff's arrest, the rape victim had given a non-hypnotically induced description of her attacker. A composite drawing of the suspect was subsequently created, reproduced and circulated throughout the police station. That same morning, defendant Shingleton stopped a man who fit the victim's description. Although the man fled, defendant Shingleton was able to view the man's features in the light from his squad car. Shingleton was later hypnotized whereupon he was able to give a more complete description of the

man he had stopped. Shingleton's description was similar to that of the victim.

Five days after the rape incident, two police officers spotted the plaintiff at a doughnut shop. Believing the plaintiff to match the description of the victim's attacker, these officers detained Jean and called Shingleton for an identification. When Shingleton arrived, he positively identified Jean as the man he had stopped. Only then was Jean arrested and taken into custody.

Just as the fact of the hypnosis does not negate probable cause to prosecute, the fact that Shingleton had been hypnotized does not negate the fact that the officers who arrested Jean had enough probable cause for his arrest. The victim herself had not yet been hypnotized and it was from her description alone that the composite was drawn. Furthermore, although hypnotized testimony may no longer be acceptable in North Carolina's state courtrooms, this certainly does not mean that hypnotized testimony cannot be used to establish probable cause. It is a recognized principle of jurisprudence that the function served by evidence in a criminal trial is very different from the function that same evidence may serve in making a preliminary determination of probable cause. *See generally, U.S. v. Harris,* 403 U.S. 573, 582 (1971). Certainly it is not the plaintiff's contention that only evidence that would be admissible at trial can be used to establish probable cause. Thus, even though Shingleton, who had been hypnotized on a prior occasion, helped to identify Jean, the court finds that the facts and circumstances within the officers' knowledge were sufficient to warrant a reasonable person to believe that Jean had committed the offense.

CONCLUSION

In 1991, Lesly Jean was set free after being convicted of rape and sexual assault. The reason for his release was the prosecutor's failure to turn over to Jean's attorney evidence relating to hypnotically induced testimony and related records. Lesly Jean now seeks monetary damages from the defendants, two policeman involved in his investigation, for the same failure to disclose evidence. This court finds, however, that while it was a denial of Jean's constitutional rights for the evidence to have been withheld, *see Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991), Jean is not now able to recover monetarily from Detective Collins or Officer Shingleton as these officers are properly shielded from such responsibility under the principle of qualified immunity. Accordingly, the court hereby GRANTS the defendants' motion for summary judgment. This action is therefore DISMISSED and the clerk is directed to close this case.

This 13th day of October, 1995.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States
District Judge

At Greenville, NC
#13

United States District Court
EASTERN DISTRICT OF NORTH CAROLINA

LESLY JEAN,

Plaintiff,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Individually,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 4:94-cv-62-H2

___ **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

XX **Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED the defendants' motion for summary judgment is granted and this case is closed.

THE ABOVE JUDGMENT ENTERED TODAY, OCTOBER 13, 1995 AND COPIES MAILED TO

Richard B. Glazier
Attorney at Law
PO Box 2275
Fayetteville, NC 28302

Marshall F. Dotson, Jr.
Attorney at Law
PO Drawer 766
Jacksonville, NC 28541-0766

Kenneth R. Wooten
Attorney at Law
PO Box 867
New Bern, NC 28563-0867

October 13, 1995
Date

David W. Daniel, Clerk
Clerk

/s/ Lisa W. Lee
(By) Deputy Clerk

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the district of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION
FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants.	AFFIDAVIT OF LESLY JEAN

NOW COMES, Lesly Jean, after first being duly sworn, deposed and says the following:

1. I am a resident and citizen of the United States residing in Brooklyn, New York and I am the Plaintiff in the above-captioned lawsuit.

2. In July of 1982, I was a Lance Corporal in the United States Marine Corps, stationed at Camp Lejeune, Jacksonville, North Carolina.

3. On July 21, 1982, between 3:00 and 4:15 a.m., I was on duty at Camp Lejeune, I was not at the home of

Alice Kathleen "Kathy" Wilson when she was raped and sexually assaulted.

4. On July 26, 1982, I was at a Dunkin Donuts near Camp Lejeune when I was detained by two officers who believed I matched the description of a rape suspect. The officers called another officer, Officer Shingleton, who came to the scene and identified me as a suspect. I was taken into custody, photographed and fingerprinted.

5. I consented to a search of my Marine locker. The police removed some of my clothes consisting of a blue tee shirt, a blue pair of shorts with a white border and white stripes on each side, and a pair of white high top basketball sneakers with the Nike name and logo inscribed in black and black shoelaces. Shortly after the search of my locker, I was released.

6. On August 3, 1982, I consented to the police recording my voice for a voice exemplar. I was born in Haiti and spent part of my life there so I have a creole accent.

7. On September 17, 1982, the Jacksonville police put me in a three man lineup with two other black men, one shorter and one taller than I. Neither of the other two men had a military haircut. At this time, Ms. Wilson allegedly identified me as her assailant.

8. In October of 1982, I was indicted for rape and sexual assault.

9. I pled not guilty to the charges against me. I did not rape or sexually assault Ms. Kathy Wilson and am not guilty of any of the crimes for which I was prosecuted.

10. The evidence against me at trial consisted solely of my sneakers, shorts and tee shirt, a blood/semen test that put me in the same 32% of the population as the rapist, and primarily the identifications of Ms. Wilson and Officer Shingleton. I offered four alibi witnesses, including three marines who saw me in the barracks at the time of the assault and my Platoon Commander, who testified that I was required to be on duty at the time of the assault and if I had not been on duty, there would have been a record of my absence, which there was not.

11. On December 5, 1982, the jury returned a verdict of guilty and sentenced me to imprisonment for two consecutive life terms.

12. At the time of my arrest, and at all times prior to Kathy Wilson's testimony at my trial, I did not know that Ms. Wilson and Officer Shingleton were hypnotized by Captain Collins. The District Attorney told my attorney, Ms. Thomasine Moore, at trial that both witnesses were hypnotized and my attorney then asked questions of both about their hypnosis.

13. When Ms. Moore and I learned that Ms. Wilson and Officer Shingleton were hypnotized, Ms. Moore requested any recordings or written records of the hypnosis sessions. The state did not give me or my attorney any records of the hypnosis at any time before or during my trial.

14. I did not know until after my conviction that Ms. Wilson may have first identified me as her attacker while under hypnosis and not in any prior identification attempts.

15. I was also not aware, until after my conviction, that officer Shingleton's description of the suspect he identified changed substantially under hypnosis. I did not know that Officer Shingleton's original description noted a stripe on the shirt, which changed to a sweatmark under hypnosis, or that under hypnosis the suspect's mustache disappeared entirely. I also did not know that, under hypnosis, Officer Shingleton recalled white shoelaces, striped socks, and shorts with no stripes, all of which differed from the clothes found in my locker. I also did not know that Officer Shingleton recalled glassy eyes, under hypnosis, but in his deposition testimony stated that he could not see the suspects eyes clearly.

16. At no time before or during my trial did I or my attorney receive copies of the Pre and Post hypnosis Worksheets completed by Captain Collins when he hypnotized Ms. Wilson.

17. After Appeals to the North Carolina courts and a Habeas Corpus Petition to the United States District Court, on May 22, 1991, the United States Court of Appeals for the Fourth Circuit granted my Habeas Corpus Petition finding that the failure of the state to disclose the records of the hypnosis sessions and prior identification attempts to me and my attorneys was constitutionally prejudicial to my case. As a result, my case was sent back to Onslow County Superior Court with instructions that I be retried or released. After my case was sent back, the Onslow County District Attorney determined insufficient evidence existed to retry my case and all the charges against me were dismissed.

18. In July of 1991 I was released from prison. I moved to Jamaica, New York to live with my stepmother. While living there I did not have a steady job and had a hard time adjusting to normal life after nine years in prison. During that time, I became addicted to alcohol. In April of 1994, I was committed to a state mental hospital in New York for treatment.

19. On May 9, 1994, I was moved to the Creedmoor Alcoholism Treatment Center in Queens Village, New York. I completed an alcohol rehabilitation program on July 5, 1994.

20. After completing the program at Creedmoor, I was referred to an aftercare program at Project Re-Newal Half-way House in Brooklyn, New York, where I now reside and will remain until July 6, 1995.

21. At project Re-Newal, I live in a shelter environment, sharing meals and facilities with about 24 other men. I have very little privacy. I work each day, beginning at 4:30 in the morning, as sanitation worker in Manhattan, cleaning up the Times Square area. My income is sent directly to the shelter and I am given about $120.00 a week for personal expenses like transportation, entertainment, and some clothes. I also attend group therapy sessions where I am able to discuss the pain and humiliation of spending nine years in prison for crimes I did not commit.

22. After I leave Project Re-Newal in July I plan to attend technical school and open my own building maintenance business. I also hope to be able to receive my honorable discharge from the Marine Corps.

23. Through this affidavit, I also incorporate by reference and verify all of the allegations pled in paragraphs 1-66 of my complaint filed in this action on May 20, 1994 in this Court. In this regard, I have read all of the paragraphs of my Complaint, knowing the contents thereof; and the same are true to the best of my own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, I believe them to be true.

Further affiant sayeth not.

This the 16 day of June, 1995.

/s/ Lesly Jean
Lesly Jean
FRANKLYN I. ROUSE
Notary Public, State of New York
No. 02R05034449
Qualified in Kings County
Commission Expires October 11, 1996

Sworn to and subscribed before me,
this 16th day of June, 1995.

/s/ Franklyn I. Rouse
NOTARY PUBLIC

My Commission expires: Oct. 11, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION
FILE NO.: 4:94-CV-62-H2

LESLY JEAN,

Plaintiff

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,

Defendants.

AFFIDAVIT OF THOMASINE E. MOORE

I, Thomasine E. Moore, after first being duly sworn, depose, and say the following:

1. My name is Thomasine E. Moore and I am competent to make the statements contained herein based upon my personal knowledge.

2. I represented Mr. Lesly Jean in his criminal trial on rape and sexual assault charges in 1982. I believed then and still believe Mr. Jean was innocent.

3. I believe Mr. Jean was in the wrong place at the wrong time when he was first identified at the Dunkin Donuts.

4. Before trial, I served the attached discovery requests on the District Attorney's office and in particular then Assistant District Attorney Walter Wayne Vatcher. No documents were provided which gave any information whatsoever pertaining to the hypnosis of any witnesses, specifically Kathy Wilson or James Shingleton. It was not until during trial that we were advised of any hypnosis taking place at all. When Mr. Vatcher advised us of the hypnosis he did not provide us with or advise us of the existence of any documentation or recordings pertaining to the hypnosis of either individual or with respect to any prior misidentifications.

5. Although I do not recall a specific conversation with Mr. Vatcher, it is my understanding as well as that of my partner, Ernest J. Wright, that Walter Vatcher was never advised by Collins, Shingleton or any other law enforcement officer of any tape recordings or notes taken during the hypnosis of these witnesses. It is my recollection that Mr. Vatcher was as shocked as my partner and I were when we found out there were actual notes and tape recordings of these hypnosis sessions – information which only came to light well after Jean's trial.

Further affiant sayeth not.

/s/ Thomasine E. Moore
Thomasine E. Moore

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

Sworn to and subscribed before me,
this 3rd day of July, 1995.

/s/ Gerri L. Johnson
NOTARY PUBLIC

My Commission expires: 9-16-98. [SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION
FILE NO.: 4:94-CV-62-H2

LESLY JEAN,

Plaintiff

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually,

Defendants.

AFFIDAVIT OF WALTER WAYNE VATCHER

NOW COMES, Walter Wayne Vatcher, after first being duly sworn, depose, and say the following:

1. My name is Walter Wayne Vatcher and from 1979 to 1984 I was an Assistant District Attorney for Onslow County, North Carolina.

2. In 1982, I prosecuted Mr. Lesly Jean on charges of first-degree rape and sexual assault.

3. I remember the case against Lesly Jean as an odd case from the beginning. The case was assigned to Detective Steve Smith who did not initially make an arrest. The

morning of the rape there was a BOL for a person wearing dark shorts and crew socks and Officer Shingleton stopped a person based on this description who then fled into to the woods. Several days later, Lesly Jean was brought in after Chief Halbert stopped at a Dunkin Donuts and observed a man who fit the description of the rapist. Halbert called Shingleton who arrived at Dunkin Donuts and identified Lesly Jean as the man whom he stopped and who fled into the woods. The officers took Jean to the police station where he was photographed and then released.

4. I remember that Kathy Wilson, the victim, did not pick Mr. Jean out of the first photo line up that included Jean's picture. I recall she returned to the police station the following day and commented that one of the pictures made her feel sick. She was shown a second photo line up and picked Jean's picture out as the one that made her feel sick. Then she later returned and picked Jean out of a line up as her assailant. Ms. Wilson was then adamant that Jean was her assailant.

5. I remember Jean consented to a search of his marine locker where the police found some tennis shorts and shoes.

6. At some point, the police took a voice recording from Jean and used it in an exemplar. Kathy Wilson eventually picked out Jean's voice.

7. At some point before the trial I went out to Jean's unit on Camp Lejeune to check the work log for Jean's unit for the date of the Wilson rape. I recall that the log sheet I needed for said date was missing.

8. I was aware at some point before the trial that Ms. Wilson had been hypnotized to gain a better description of the assailant. I was told by Delma Collins that nothing was gained from the hypnosis. I do not recall being made aware that the hypnosis was recorded nor that Captain Collins prepared Pre and Post Hypnosis Worksheets.

9. I did not disclose my knowledge of the hypnosis of Kathy Wilson to the Defendant prior to trial because the hypnosis seemed insignificant. I had been told by Captain Collins that the hypnosis did not materially increase her memory of the event and it did not help identify Jean. I do not recall being made aware that there were any records of the hypnosis. It was not until during the trial that I and the District Attorney felt we better disclose the fact of Ms. Wilson's hypnosis to the defense. This information was disclosed to the defense attorneys prior to the voir dire of Mrs. Wilson with regard to the identification issue.

10. I do not recall learning of any recordings of the hypnosis sessions and never heard any tape from the hypnosis sessions of either Ms. Wilson or Officer Shingleton. I do not recall learning about and I did not receive nor did I review any Pre and Post Hypnosis Worksheets or other written records of the hypnosis sessions.

11. I was not aware, at any time prior to or during the prosecution of Lesly Jean, that Officer Shingleton's description of the suspect he identified changed substantially under hypnosis. I was aware that there were some changes in his description after hypnosis. I seem to recall that under hypnosis he no longer recalled any facial hair

and his description of the shirt may have changed somewhat.

12. I was not made aware of any exculpatory information regarding the hypnosis sessions or any other matter. I do not recall being made aware of recordings and written records, that could have been used by defense counsel to impeach the testimony of the two identification witnesses, existed.

13. Had I been made aware that exculpatory information existed, I would have turned this information over to the defense as required by law.

Further affiant sayeth not.

This, the 12 day of July, 1995.

/s/ Walter Wayne Vatcher
Walter Wayne Vatcher

Sworn to and subscribed before me,
this 12 day of July, 1995.

/s/ Loraine M. Carbone
NOTARY PUBLIC

My Commission expires: 12-15-99. [SEAL]

Supreme Court, U.S.
FILED
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CLERK

No. 98-980

In The

Supreme Court of the United States

October Term, 1998

LESLY JEAN,

Petitioner,

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, Individually; JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina Police Department, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH R. WOOTEN
Counsel of Record
MARY V. CAVANAGH
WARD AND SMITH, P.A.
1001 College Court
Post Office Box 867
New Bern, North Carolina
28563-0867
(252) 633-1000
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Delma Collins and James Shingleton respectfully request that the Court deny the Petition of Lesly Jean for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF CASE

A. Statement of Facts

Pursuant to Supreme Court Rule 15.2, Respondents have restated the relevant facts in this action in an effort to correct the numerous mischaracterizations and misstatements of fact in Petitioner's Statement of Facts. Respondents particularly note Petitioner's almost exclusive reliance on the facts as set forth in the Fourth Circuit's panel opinion, which was vacated by the *en banc* court and which contains several factual inaccuracies.[1]

On July 21, 1982 from approximately 3:00 a.m. to 4:15 a.m., Ms. Alice Kathleen Wilson was brutally raped, sexually assaulted and beaten in her bedroom. Ms. Wilson was able to see her assailant's face because of the light shining into her bedroom from the kitchen. Resp. App. 37, J.A. 93.[2] After the rape, a police officer arrived, took a

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[1] Internal Operating Procedure of the Fourth Circuit 40.2, which was in effect at the time, provides that the original judgment and opinion of the Fourth Circuit "are vacated" once a petition for rehearing is granted.

[2] References to the Appendix ("App.") are to the appendix attached to Petitioner's brief. References to Respondents'

brief description of the perpetrator from Ms. Wilson and broadcast it on the police radio; the description was of a black male, five feet eight inches, 160 or 165 pounds, wearing a dark shirt, dark jogging shorts, "high-top" socks and white, high-top tennis shoes. App. 3; J.A. 423, 559. Ms. Wilson also described her assailant as having a slight accent. J.A. 423. At approximately 4:40 a.m., Respondent James Shingleton, a police officer with the City of Jacksonville, North Carolina, stopped a man walking along the highway who fit this general description of Wilson's assailant. After Shingleton questioned him for about one and one-half minutes, the man fled into nearby woods. App. 3. Later that morning, Shingleton described the person he stopped as black, five feet ten inches tall, 170 pounds, close-cut hair and a mustache, and wearing blue shorts, a blue shirt with writing, white knee-high socks, and white tennis high-tops. App. 3; J.A. 429, 595.[3]

Shortly after the rape, Ms. Wilson was taken to the hospital for treatment and then to the police station to give a statement. In this statement, she describes the rapist as a black male, five feet eight inches tall, 165 or

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Appendix ("Resp. App.") are to the appendix attached to this brief. References to the Joint Appendix ("J.A.") are to the joint appendix filed by the parties in the United States Court of Appeals for the Fourth Circuit.

[3] Although Petitioner, quoting from the Fourth Circuit's panel decision, asserts that Wilson's description "did not match, in many respects, that provided by Shingleton" (Petition at 2), the two descriptions given by Wilson and Shingleton before any hypnosis both identify a black male, approximately the same height and the same weight, with dark shorts, a dark shirt, long socks, and white tennis shoes.

170 pounds, muscular, with dark, probably navy blue, shorts, white crew socks, high top sneakers and black "marine" close-cut hair. App. 4; J.A. 436. Later that morning, Ms. Wilson met with an S.B.I. artist to produce a composite sketch of the suspect. She specifically told the artist that her assailant had "light freckling" and a "larger freckle on the left, lower cheek." J.A. 582. However, because the artist's attempts to denote the larger freckle with a black grease pencil "caused the freckle to become too prominent or to become too distinct," the artist simply "left it off" the sketch. J.A. 586.

On July 22, 1982, Respondent Delma Collins, who had attended an eighty-hour training course on hypnosis and was then head of the detective division, hypnotized Shingleton concerning the description of the suspect Shingleton had stopped the day before. Resp. App. 1-4, J.A. 57-60.[4] During this hypnosis session, Shingleton now recalled that the writing on the shirt was a sweat mark instead, that the suspect did not have a mustache and that the suspect's socks had blue stripes. App. 4; J.A. 445, 612. After the hypnosis, Detective Steve Smith, the lead investigator on the case, recorded in his notes that Shingleton's description "matches the one given by victim." App. 4; J.A. 441.[5]

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[4] Petitioner, again quoting from the Fourth Circuit panel opinion, infers that Shingleton was hypnotized in an effort to reconcile the differences between his description and that given by Ms. Wilson. Petition at 3. There is no evidence in the record to support such an assumption.

[5] Petitioner, relying on a factual mistake in the Fourth Circuit's panel decision, erroneously asserts that this statement was contained in *Respondent Collins'* log and that it was the

On July 26, 1982, Chief of Police Roger Halbert, who had seen the S.B.I. composite sketch of the suspect, noticed a man in a donut shop who looked "just like" the sketch; the man was Petitioner Lesly Jean, who was then a marine stationed at Camp LeJeune in Jacksonville. J.A. 107. Chief Halbert called Officer Shingleton to the donut shop, Shingleton identified Petitioner Jean as the person he had stopped just after the rape, and Jean was arrested. App. 4.[6] Detective Smith interviewed Jean and, after Jean's consent, searched his locker and laundry bag at the marine base. Smith confiscated a pair of white high-top tennis shoes, dark blue athletic shorts, and a blue t-shirt. App. 5. Jean was later released.

On July 27, 1982, Wilson returned to the police station to view a photo lineup that included Jean's picture. Although Wilson could not make a positive identification at that time, she called Detective Smith the next day because one of the photos had made her "feel sick." App.

"only notes recorded" after Shingleton's hypnosis. Petition at 4. The record clearly reveals that the statement was recorded by Officer *Smith* in his notes (J.A. 441) and that Respondent Collins completed a Hypnosis Information Worksheet on the results of Shingleton's hypnosis. J.A. 445.

[6] Petitioner asserts that at the time of his arrest, he had "no freckles or remarkable spots on his face." Petition at 4, n.1. As noted above, Ms. Wilson described a large "freckle" on Jean's left cheek to the S.B.I. artist on the day of her attack, before any hypnosis. During Jean's criminal trial, Ms. Wilson specifically pointed out this freckle to the court; Jean admitted at trial that he had such a mark but claimed he learned of its existence just "the other day." J.A. 527-28, 690.

5, J.A. 442, 449.[7] She returned to the station and pointed to Jean's photo as the one who made her feel ill. J.A. 449. On July 30, 1982, on the recommendation of Detective Smith, Respondent Collins hypnotized Wilson to determine if she could recall anything else about the photo that made her feel sick. During this hypnosis session, only three pieces of information were added to Wilson's description, that the assailant's eyes were gray, that she remembered his shoes had white shoelaces and a Nike emblem, and that the accent she had earlier described to the police might be Puerto Rican. App. 5; J.A. 458.[8] In fact, Detective Smith and Officer Collins considered the session to be unproductive because of the lack of new information. Resp. App. 7; J.A. 63; App. 5. On August 4, 1982, Ms. Wilson positively identified Jean's voice as her

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[7] Again, Petitioner misstates the facts, asserting that on the second day Ms. Wilson stated only that Jean's eyes looked "haunty." Petition at 5.

[8] Petitioner makes multiple misstatements concerning Wilson's hypnotic session: (1) he cites as "new information" revealed during the hypnosis Wilson's belief that the shorts were a solid dark color without any stripes; the Hypnosis Information Worksheet contains no reference to stripes and Wilson had already, pre-hypnosis, identified the shorts as dark, probably blue; (2) Petitioner cites as "new information" Wilson's statement during hypnosis that Petitioner may have had freckles. Ms. Wilson, on the day of the attack and before hypnosis, had already told the S.B.I. artist that Petitioner had light freckling on his face and a larger freckle on his left cheek, which Ms. Wilson later identified in court (J.A. 458, 527-28, 586); and (3) he cites as "new information" Wilson's belief that her attacker had an accent. However, Ms. Wilson informed Officer Pullicino shortly after the assault that her assailant had a "slight accent." (J.A. 423). Petition at 5.

rapist[9] and, on September 17, 1982, identified Plaintiff out of a three-person live lineup. J.A. 136-137; App. 6.

Petitioner was indicted in October 1982 for rape and first degree sexual offenses. App. 6. Respondents informed the prosecutor, Walter Vatcher, well before trial that Ms. Wilson and Officer Shingleton had been hypnotized and, as Mr. Vatcher admits, turned over all evidence that he requested from them. Resp. App. 43-46. Mr. Vatcher apparently never asked the officers for any materials related to the hypnoses, such as the Hypnosis Worksheets or the tape-recordings of the hypnoses sessions. Resp. App. 43-46, App. 22. Vatcher disclosed to defense counsel the fact that Shingleton and Wilson were hypnotized prior to Ms. Wilson's cross-examination at trial; he never disclosed the recordings of the hypnotic sessions, despite general pretrial discovery requests and a more specific request by defense attorneys at trial. App. 6; J.A. 163.

Petitioner's counsel at the criminal trial cross-examined both Shingleton and Wilson concerning the hypnoses

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[9] Petitioner asserts that Ms. Wilson "tentatively selected two possible voices" and "after more play backs and delay," identified Jean's voice. Petition at 5-6. The record does not support these allegations. Ms. Wilson identified one voice, that of Petitioner, on August 4, 1982 after listening to the tapes "two or three times." J.A. 461, 563-566; App. 6. On August 10, 1982, Ms. Wilson called Detective Smith to check on the case; when she learned that Officer Smith had not considered her statement on August 4 as a positive identification of Jean's voice, she explained that she had meant her August 4 action to be a positive and conclusive identification of Jean's voice as that of her assailant. J.A. 565-566; App. 6.

and the results of the hypnoses. Shingleton testified that his description of the suspect changed in certain respects under hypnosis and that he was not "absolutely sure" of his in-court identification of Petitioner. J.A. 612-615. On December 5, 1982, Plaintiff was convicted of rape and sexual assault and sentenced to two consecutive life terms.

B. Proceedings Below

Petitioner claims that the United States District Court for the Eastern District of North Carolina, in its decision granting Respondents qualified immunity, determined that Petitioner's right to have the government disclose "exculpatory evidence" regarding hypnosis-related testimony was not clearly established in 1982. Petition at 9. The District Court, however, specifically found that the evidence at issue was *not* exculpatory but had impeachment value only. App. 72. Petitioner also mischaracterizes numerous aspects of the Fourth Circuit's *en banc* decision, which misstatements will be addressed below.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S APPROACH IN DETERMINING WHAT SOURCES OF LAW SHOULD ORDINARILY BE USED TO DECIDE WHETHER A RIGHT WAS CLEARLY ESTABLISHED DOES NOT CONFLICT WITH ANY SUPREME COURT CASE OR WITH ANY DECISIONS OF OTHER CIRCUIT COURTS

In its *en banc* opinion, the Fourth Circuit adopted an "approach" for determining what sources of law a court

generally may consider in deciding whether a right was clearly established for qualified immunity purposes: "ordinarily, therefore, courts in this circuit need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose to determine whether a right was clearly established at a particular time." App. 18. The Fourth Circuit's rationale for adopting this approach is firmly grounded in the Supreme Court's own recognition that public officials should be shielded from liability for "judgment calls made in a legally uncertain environment." *Ryder v. United States*, 515 U.S. 177, 185 (1995). As the Fourth Circuit cogently explained:

> The very immensity of American jurisprudence creates the distinct likelihood that jurisdictions will offer conflicting opinions over how government officials should carry out their tasks. To hold officials responsible for sorting out these conflicts, without any guidance about what jurisprudence to follow, could generate widespread confusion over the scope of official obligations. An unbounded legal universe would give rise to guessing games over whether this or that decision in this or that jurisdiction created a clearly established right. Such a limitless universe would also give judges broad latitude to second-guess the actions of officers on the spot.

App. 17-18 (cite omitted). Contrary to Petitioner's arguments, the Fourth Circuit's approach creates no conflict with other circuit courts or with any Supreme Court opinion.

First, Petitioner attempts to create a conflict where none exists by exaggerating the differences between the

circuit courts in their handling of this issue – what law should be considered in determining whether a right was clearly established at the time of the conduct in question. Respondents freely acknowledge that the circuit courts have formulated standards which differ slightly from each other. Like the Fourth Circuit, the Eleventh Circuit looks to decisions of the United States Supreme Court, its own circuit or the highest court of the state in which the case arose. *See Jenkins v. Talladega City Board of Education*, 115 F.3d 821, 826 n.4 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 412 (1997). The Second and Sixth Circuits rely on case law of the Supreme Court and courts within their own circuit. *Russell v. Selsky*, 35 F.3d 55, 57 (2nd Cir. 1994); *Ohio Civil Service Employees Assoc. v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). The Tenth Circuit "ordinarily" bases its judgment on Supreme Court or Tenth Circuit precedent "or the clearly established weight of authority from other courts." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

The Ninth Circuit has stated that it looks "to Supreme Court precedent and then to lower court decisions with an eye toward whether the Supreme Court would adopt their analysis." *Ortega v. O'Connor*, 146 F.3d 1149, 1157 (9th Cir. 1998). The Seventh and Eighth Circuits seem to take a broader view, looking at all relevant case law but requiring a sufficient consensus of that case law. *Henderson v. DeRobertis*, 940 F.2d 1055, 1058-59 (7th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992); *Buckley v. Rogerson*, 133 F.3d 1125, 1129 (8th Cir. 1998). Finally, the Fifth Circuit has stated that Supreme Court and Fifth Circuit cases "will loom largest in our inquiries," but that the court has some discretion to look to other decisions

depending on the circumstances of each case. *Doe v. State of Louisiana*, 2 F.3d 1412, 1416 n.8 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994).[10]

These marginally different standards simply represent variations on a common theme and do not evince a "hopeless split" among the circuits, as Petitioner contends. Petition at 15. The common theme is the Supreme Court's general standard that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Beyond that, the Supreme Court has directed only that "a court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.' " *Elder v. Holloway*, 510 U.S. 510, 516 (1994), *quoting Davis v. Scherer*, 468 U.S. 183, 192 n.9 (1984). Thus, the Court presumably has left it up to each

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[10] Petitioner mischaracterizes two decisions by circuit courts in his effort to manufacture dissension among the ranks on this issue. Petitioner states that the First Circuit *held* that a clearly established right may be found even where the Supreme Court and the circuit court had never addressed the issue. Petition at 14. In *Soto v. Flores*, 103 F.3d 1056, 1065 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 71 (1997), the court merely cited a *treatise* with a statement to that effect. The *Soto* court found, however, that the right in that case was *not* clearly established, in part because the First Circuit had not addressed the contours of the right at the time of the conduct in question. Similarly, Petitioner asserts that in *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996), the court found a right to be clearly established where that court had not ruled on the issue and there was a "split" on the issue in other circuits. In that case, however, two local district court cases had decided the issue and the "split" in the circuits consisted of only one other circuit.

circuit court to define for itself what those relevant precedents are, as long as the courts remain within the bounds of *Anderson*'s instruction that the officials must have sufficient notice from the "pre-existing law" that their conduct was unlawful.

None of the circuits has strayed from these basic Supreme Court guidelines. Each has formulated a rule, although each one slightly different, to guide its courts in determining when the "pre-existing law" was established clearly enough that those public officials within the circuit would know that their conduct was unlawful. Indeed, there is no need for the Supreme Court to set forth a universal rule as to the precedents that may or must be considered in determining clearly established law. As long as government officials know the rule that their own circuit has adopted on this issue, they have sufficient notice as to the sources of law that govern their conduct. Thus, no split exists among the circuits that needs to be resolved by the Supreme Court.[11]

Second, Petitioner attempts to create a conflict where none exists between the Fourth Circuit's approach and this Court's decision in *United States v. Lanier*, 117 S. Ct.

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[11] Petitioner attempts to portray the Fourth Circuit's rule as way out of line with that of other circuits. As set forth above, however, it is identical to the rule that has long been established in the Eleventh Circuit and is very similar to the rules of the Second and Sixth Circuits. Likewise, Petitioner's characterization of the Fourth Circuit's approach as "rigid" and "formalistic" ignores the Fourth Circuit's caveat that the rule should "ordinarily" apply, clearly leaving open the possibility that circumstances might warrant the application of a different rule. Petition at 15; App. 18.

1219 (1997). In *Lanier*, the Supreme Court rejected the Sixth Circuit's determination that *only* Supreme Court precedent could clearly establish the law for purposes of 18 U.S.C. § 242. The Court analogized that, in the qualified immunity context under 42 U.S.C. § 1983, it had "referred to decisions of the Courts of Appeals when enquiring whether a right was 'clearly established.' " *Id.* at 1226. Although the Supreme Court validated the Sixth Circuit's "concern" that disparate decisions in different circuits might leave the law "insufficiently certain," it declined to create a "categorical rule" that only Supreme Court precedents could be used to provide "fair warning" under Section 242. *Id.* at 1226-27. Thus, the *Lanier* decision held simply that a court under 18 U.S.C. § 242 should not rely solely on Supreme Court precedent in determining whether the defendant had received "fair warning." The Court implied that circuit court opinions could be relied on in addition to Supreme Court precedent but, significantly, it did *not* dictate for the lower courts exactly which courts or which jurisdictions they could and could not follow, even though it had every opportunity.

This unwillingness to set one absolute standard as to the body of case law that may be considered for "fair warning" under Section 242 in no way indicates a condemnation of the Fourth Circuit's approach for determining "clearly established" law in the qualified immunity context. As with *Lanier*, the Supreme Court has had many opportunities in Section 1983 cases to create a "categorical rule" for the lower courts to follow in defining the sources of law that may be considered in enquiring whether a right was "clearly established." Its failure to do so supports the argument that the Supreme Court is

allowing the circuit courts to create their own standards, as long as those standards provide sufficient notice to public officials as to the lawfulness of their conduct. The Fourth Circuit's standard, which is almost identical to that of several other circuits, meets this criterion.[12]

II. THE FOURTH CIRCUIT IN THIS ACTION CORRECTLY APPLIED *ANDERSON V. CREIGHTON* IN DEFINING THE RIGHT AT ISSUE WITH THE REQUIRED LEVEL OF PARTICULARITY

Petitioner, again, attempts to create a conflict where none exists, this time by arguing that the Fourth Circuit, in opposition to several circuits and *dicta* from the Supreme Court, has set forth a rule requiring an exact "case on point" before it will find a right "clearly established" under the qualified immunity analysis. The

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[12] Indeed, the Eleventh Circuit, which has adopted the same approach as the Fourth Circuit for determining relevant precedents, has already considered and dismissed this same argument concerning *Lanier*. In *Jenkins v. Talladega City Board of Education*, 115 F.3d 821, 827 n.4 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 412 (1997), the court rejected the argument that *Lanier* created "tension" with the Eleventh Circuit's "decisional law deeming relevant solely in-circuit precedent." As the Eleventh Circuit noted, "the Supreme Court in Lanier simply did not address the extent to which decisions of the 'lower courts' must, should, or may be considered in deciding whether a constitutional right has been clearly established, nor did it identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place. We therefore do not construe Lanier as being in conflict with our precedent regarding the relevant decisional law to which we must look in analyzing a claim of qualified immunity." *Id.*

Fourth Circuit's opinion in this case establishes no such rule and adheres strictly to the Supreme Court's directions in *Anderson v. Creighton*, 483 U.S. 635 (1987).[13]

The Supreme Court's mandate in *Anderson* concerning the process by which a court should determine whether the law was "clearly established" bears repeating here, especially in light of Petitioner's charge that the Fourth Circuit's opinion reveals "a complete misunderstanding about the nature of qualified immunity" (Petition at 19):

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been

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[13] Petitioner declares that "in multiple citations throughout the majority opinion, the Fourth Circuit clearly requires a case on point for § 1983 liability to ever attach." Petition at 17-18. It is indicative of the weakness of this argument that Petitioner neither quotes from nor cites to *any* of these "multiple citations." They simply do not exist.

> 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639-40.

The Fourth Circuit's opinion in this case illustrates its understanding of and allegiance to these principles. The *en banc* decision states that *Anderson* "requires that the right be defined at a high level of particularity" but "of course" does *not* require "that a prior case have held identical conduct to be unlawful." App. 16, 19. Nor does the Fourth Circuit itself require, suggest or even intimate that a case exactly on point is needed for a right to be clearly established. The issue in this case was whether a police officer in 1982 would know that he had a constitutional duty to provide evidence to prosecutors. The Fourth Circuit's analysis that no relevant case law had clearly established this proposition did not reject factually similar cases in a zealous quest for the perfect "on all fours" case. The court's review of case law existing in 1982 revealed that decisions had established a *prosecutor's* duty to disclose evidence but that no cases had held that a *police officer* also had that constitutional duty. App. 19-21. As the Fourth Circuit explained, "police officers in 1982 could not have been expected to survey decisions involving prosecutors' failures to disclose evidence to the

defense and conclude that, by analogy, they bore an independent constitutional duty to provide evidence to prosecutors." App. 19.[14] Thus, the Fourth Circuit made a well-reasoned decision that cases bearing on a prosecutor's duty to disclose evidence did not reach the level of factual particularity which the *Anderson* decision requires. This decision exhibits no "misunderstanding" about the qualified immunity analysis and needs no review by this Court.[15]

Not only is the Fourth Circuit's decision that the law was not clearly established sound under *Anderson* principles, it also creates no conflict with the law of any other circuit or with any ruling of the Supreme Court. Petitioner cites three court of appeals cases for the proposition that "numerous circuits have held it is not necessary there be a specific holding in order to find a constitutional rule has been 'clearly established.' " Petition at 18. All three cases, however, require some pre-existing law to exist which clearly establishes the right in question; they,

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[14] Indeed, the Fourth Circuit noted that in this case Respondent police officers turned over all the evidence the prosecutor requested and that it was the *prosecutor's* duty under *Giglio v. United States*, 405 U.S. 150 (1972), to ask the police officers for any materials related to the hypnoses. App. 22.

[15] Supreme Court Rule 10 provides that "a petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Petitioner cannot dispute that the Fourth Circuit properly stated Supreme Court case law as to when a right is clearly established. Even if Petitioner's contention that the Fourth Circuit misapplied that law under the facts of this case had merit, such a fact-specific argument does not present a question for review by this Court.

like the Fourth Circuit and the Supreme Court, simply do not require a case directly on point.

Nor does the Fourth Circuit's analysis of clearly established law conflict with this Court's *dicta* in *Lanier*. In *Lanier*, this Court reiterated *Anderson*'s warning that liability should attach in the qualified immunity context "only if 'the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " 117 S. Ct. at 1227, *quoting*, *Anderson*, 483 U.S. at 640. It then noted that different factual circumstances may necessitate different levels of factual particularity to satisfy *Anderson*'s standard:

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. See, e.g., Mitchell v. Forsyth . . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.

Id. No conflict exists between this language and the Fourth Circuit's analysis in this case because the Fourth Circuit applied the level of "prior factual particularity" necessary under the circumstances. The present case is not one in which, under *Lanier*, a "general constitutional rule" applied "with obvious clarity" to the specific conduct in question. Indeed, the issue of whether police officers in 1982 had a constitutional duty to disclose hypnosis-related evidence to the prosecution has been

debated in this and related cases for some fourteen years, with various state and federal courts split as to whether or not Respondents violated the constitution in failing to disclose the evidence. App. 73. *See Santamorena v. Georgia Military College*, 147 F.3d 1337, 1340 n.6 (11th Cir. 1998) (noting that *Lanier*'s statement that a general constitutional rule may apply involves only "exceptional cases" which "rarely arise").

Finally, Petitioner extrapolates the Fourth Circuit's reasoned and rational approach in this case to a bizarre world where public officials commit heinous constitutional offenses and go laughingly free from liability because no exact case on point has addressed that particular egregious conduct before. Petition at 20. Petitioner's scenario might very well be the *Lanier* case where a general constitutional rule applies "with obvious clarity" and thus there is no need for a court to look for case law with a high degree of "prior factual particularity." *Lanier*, 117 S. Ct. at 1227. Several federal courts have recognized that conduct that "shocks the conscience" is so patently egregious that the constitutional right it violates is necessarily clearly established. *Grendell v. Gillway*, 974 F. Supp. 46, 52 (D. Me. 1997); *Anderson v. Romero*, 72 F.3d 518, 526-27 (7th Cir. 1995); *Fernandez v. Leonard*, 784 F.2d 1209, 1216 (1st Cir. 1986).

That scenario is not this case, where Respondents believed that the hypnoses sessions did not create any exculpatory evidence (J.A. 63, 75-76), where a federal district court judge found the evidence to have impeachment value only (App. 72), and where Petitioner's criminal trial attorneys admitted that, after hearing Ms. Wilson's trial testimony concerning her hypnosis, they

did not even move to re-open voir dire on the identification issue because they believed that "no new evidence [was] developed" during her testimony. J.A. 716. Nor is there any indication by the Fourth Circuit in this decision or any other decision that it would require an exact case on point to establish Section 1983 liability for any situation, much less one where the conduct was patently egregious. Petitioner's argument that the Fourth Circuit has created a rule requiring a case directly on point misreads the court's careful application of *Anderson* to the facts of this case.

III. THE FOURTH CIRCUIT DID NOT ERR IN HOLDING THAT THE LAW WAS NOT CLEARLY ESTABLISHED IN 1982 THAT POLICE OFFICERS HAD A CONSTITUTIONAL DUTY TO TURN OVER THE EVIDENCE AT ISSUE TO THE PROSECUTOR

Petitioner brands as error the Fourth Circuit's determination that, as of 1982, the relevant law was not clearly established that a police officer had a constitutional duty to turn over the evidence at issue in this case to the prosecution. A careful examination of Petitioner's argument as well as the legal history of this case reveals that the Fourth Circuit committed no error.

Petitioner's argument itself supports a finding of no error. Petitioner contends that "in conclusion, *Brady*, *Giglio*, and *Barbee* directly control this case. As of 1982, the police were under a long-established duty to disclose

exculpatory information to the prosecutor." Petition at 24.[16] Yet, only five paragraphs earlier, Petitioner himself admits that *Brady* and *Giglio* involved the *prosecutor's* duty to disclose exculpatory information to the defense, not the police officer's duty. Petition at 20-21. As Petitioner correctly notes:

> In the case at bar, however, it is not the prosecutor's decision to withhold exculpatory evidence that is at issue; rather it is the decision of the investigating police officers which is in question. Thus, *the issue narrows* to whether in 1982 a police officer's failure to disclose information to prosecutors, as derived from *Brady v. Maryland*, was clearly established.

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[16] Throughout his brief, Petitioner consistently refers to the evidence that was not disclosed as "exculpatory." Petition at 19, 21, 23-24. Respondents argued in the federal district court and before the Fourth Circuit that the evidence had impeachment value only and therefore did not fall under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, the hypnosis testimony and accompanying records in no way exculpated Petitioner; they served only as a possible means of impeaching the testimony of Ms. Wilson and Respondent Shingleton as to the differences in their pre- and post-hypnosis descriptions. App. 72. Thus, Respondents object to Petitioner's continued characterization of the evidence at issue as exculpatory. The *en banc* opinion, however, does not address this difference or rely on it in its analysis of whether the right of disclosure was clearly established. It correctly focuses on the fact that, in 1982, only the prosecutor's and not the police officer's constitutional duty to disclose hypnosis-related evidence to the defense had been established. App. 19-24.

Petition at 21 (emphasis added). That is exactly the point that the Fourth Circuit made; *Brady* and *Giglio* do *not* control this case because they involve the prosecutor's duty to disclose evidence and do not address the police officer's duty. App. 19. The factual particularity required by *Anderson* is not satisfied.

That leaves Petitioner, under his own argument, with the lone case of *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), as clearly establishing a police officer's duty to disclose evidence to the defense. The Fourth Circuit distinguished *Barbee* as follows:

> *Barbee* did not require police, as a constitutional matter, to furnish evidence to a prosecutor. Instead, as this circuit later explained, *Barbee* held simply that the police's knowledge of such evidence would be imputed to the prosecutor in deciding whether the prosecutor had fulfilled his *Brady* duties . . . Thus, while prosecutors are not relieved of their *Brady* duties for failing to disclose material evidence known only to the police, police officers who in 1982 failed to give such evidence to prosecutors did not themselves violate a clearly established constitutional right.

App. 20.

That the *Barbee* decision did not clearly establish the right in question is also notably illustrated by the legal history of this action. In October 1995, the United States District Court for the Eastern District of North Carolina granted Respondents qualified immunity, holding that *Brady* was not controlling and that the right in question was not clearly established until the 1985 Supreme Court decision of *United States v. Bagley*, 473 U.S. 667 (1985).

App. 71-73. Reversing this decision in March 1997, the Fourth Circuit panel opinion held that the right was clearly established. Significantly, however, Judge Ervin, writing the panel opinion, *never* cites *Barbee* in his analysis of whether "the specific right infringed was clearly established in 1982." App. 52. Instead, the panel decision relies on *Giglio*, *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), *United States v. Miller*, 411 F.2d 825 (2nd Cir. 1969), and *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975) as "clearly establishing" the right. Judge Hamilton, concurring in the judgment, declined to accept the panel's "clearly established" analysis; he found that the Supreme Court in 1982 had not "explicitly addressed the disclosure duties of police under *Brady*," but that the Fourth Circuit had done so in *Barbee*, a case not mentioned once in the panel opinion's "clearly established" analysis. App. 61-62.

Interestingly, once Judge Hamilton cites *Barbee* in his concurrence in the panel opinion, it suddenly becomes the "critical case" which beyond all doubt established the right in question. Petition at 21. In his dissent from the *en banc* opinion, Judge Ervin, who in the panel opinion relied on every case but *Barbee* as establishing the right in question, now jumps on the *Barbee* bandwagon, declaring that the police's duty to turn over evidence had been "clearly established in this circuit since at least 1964 [the date of *Barbee*]." App. 35. In Judge Hamilton's dissent from the *en banc* opinion, he once again proclaims *Barbee* as the clear precedent on this issue and bolsters his argument by noting that "in cases post-*Barbee*, we have consistently held that a police officer can be liable under § 1983 for the failure to disclose material exculpatory

evidence." App. 40. Notably, *none* of the three "post-*Barbee*" cases he cites ever mention *Barbee* as the Fourth Circuit precedent establishing the police officer's disclosure duties, or even mention it at all. *See Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995); *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). The *Barbee* decision surely cannot be hailed as clearly establishing the constitutional right in question when the panel opinion overlooked it and cases since *Barbee* consistently have failed to cite it as controlling precedent.

Finally, the Fourth Circuit's determination that the right in question was not clearly established likewise is supported by the heated debate and notable lack of consensus among the courts who have considered the question. The Supreme Court of North Carolina, in denying Jean's appeal from his criminal conviction, and Judge Boyle of the United States District Court for the Eastern District of North Carolina, in denying Petitioner's writ of habeas corpus, found that Respondents had committed no constitutional error in failing to disclose the hypnosis-related evidence. App. 73. The Fourth Circuit reversed, holding that the state's failure to disclose was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Howard of the Eastern District of North Carolina then held that Respondents were entitled to qualified immunity on Petitioner's § 1983 claims, specifically finding that the right in question was not clearly established. App. 71-73. The Fourth Circuit panel reversed, and the *en banc* majority affirmed the district court. Moreover, even the courts who have found the right clearly established have not agreed

as to when and by what case law the unlawfulness became apparent. The cardinal premise of the qualified immunity doctrine, that public officials are to be shielded from liability when they act in a legally uncertain environment, would be seriously compromised by holding Respondents here liable for conduct that learned state and federal judges of the Fourth Circuit cannot, even in hindsight, agree as to its lawfulness or unlawfulness.

IV. THE FOURTH CIRCUIT CORRECTLY HELD THAT RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR CONSTITUTIONAL DUTY OF DISCLOSURE WAS NOT CLEARLY ESTABLISHED IN 1982

Contrary to Petitioner's argument, the Fourth Circuit's opinion does not hold that, even though a police officer's constitutional duty of disclosure was clearly established, Respondents were nonetheless entitled to qualified immunity because no Section 1983 case had as of 1982 held officials monetarily liable for that particular transgression. Instead, the Fourth Circuit found that an officer's constitutional duty was *not* clearly established in 1982. As the Fourth Circuit explained:

> In sum, police officers in 1982 could reasonably have expected to be internally accountable to prosecutors for not turning over evidence in their possession . . . But the officers had no earthly idea that they would be subject to a federal cause of action for money damages when no relevant decision had held that the police's responsibility to furnish evidence to the

> prosecution was governed by federal constitutional law.

App. 21.

The Fourth Circuit's reasoning strictly adheres to the long-standing principle that the purpose of a Section 1983 action is "for vindication of *constitutional* guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (emphasis added). The Fourth Circuit properly determined that, because police officers in 1982 were not aware that their conduct violated any constitutional guarantee, Respondents were entitled to qualified immunity. That is a far cry from Petitioner's suggestion that the Fourth Circuit, in conflict with "nearly every other circuit in the country," will now grant qualified immunity to every government official unless there exists "a specific monetary liability case [ ] on point." Petition at 25.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted this 15 day of January, 1999.

Kenneth R. Wooten
Counsel of Record
For the firm of
WARD and SMITH, P.A.
1001 College Court
Post Office Box 867
New Bern, North Carolina
28562-0867
Telephone: (252) 633-1000
Facsimile: (252) 636-2121
Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION
CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants	AFFIDAVIT OF DELMA G. COLLINS

1. I am Delma G. Collins and I am competent to make the statements contained herein based upon my personal knowledge.

2. I am currently the Assistant Chief of Police in charge of Investigatory Services for the Jacksonville, North Carolina Police Department. I have been employed with the Jacksonville Police Department since 1970. I worked my way up through the ranks of the Department from a patrol officer to my current position. During July-December, 1982, I held the rank of Captain with the Jacksonville Police Department.

3. During July 1981, I received training from the State of North Carolina at its Justice Academy in Salemburg to hypnotise [sic] witnesses in criminal investigations. The requirements for acceptance into the

program where I received this hypnosis training were ten years of experience on a police force and a recommendation from the police department. Over 150 law enforcement officers applied for this training program, but only 14-16 were accepted. I was told that the persons accepted were the cream of the crop of law enforcement officials.

4. The training program lasted two weeks, five days per week, and eight hours per day. Dr. Stan Riesess, a Psychiatrist from Charlotte was one of the instructors. He performed approximately eighty to eighty-five percent of the training. I received intense training. Dr. Riesess and the other officials hired by the State to train the class appeared to me to believe quite strongly that hypnosis was scientific. They also appeared to me to approach our training in hypnosis as a science class. My perception of the training I received was that the instructors believed that hypnosis was the solution or cure for faulty conscious memories. They appeared to me to believe that hypnosis was the tool to unlocking existing memories trapped within the subconscious mind. They trained me on how to perform hypnosis and I performed several hypnoses while receiving training. Likewise, I was hypnotised [sic] during this training. Where further information was needed from a witness who had provided a partial description of a suspect, I was trained to base my questions on information already known, which, in hindsight, may appear to be impermissibly leading or suggestive. In any event, I emerged from this two-week indoctrinating class with a total belief in hypnosis as a tool for unlocking stored memories. At all times, I had a good faith belief that hypnosis was extremely reliable and truly unlocked, not created, memories stored inside of a

person's subconscious. I believed hypnosis was the catalyst which sparked the flow of memory between the subconscious and the conscious portion of the brain. I also emerged from my training believing that the opponents of hypnosis were medical doctors or psychologists who, in large part, were not fundamentally opposed to hypnosis, but had a monetary interest in limiting hypnosis to medical doctors and psychologists. During the early 1980s, one could hear arguments from all over the spectrum concerning hypnosis in law enforcement investigations. Standards or procedural safeguards concerning how to conduct a hypnosis for law enforcement purposes also varied widely.

5. In 1982, hypnosis was legal in North Carolina and, although fragmented controversy existed among the legal and medical communities, especially in other states, the officials retained by the State of North Carolina who trained me were zealously in favor of the liberal use of hypnosis.

6. Since 1981, I have been a member of the North Carolina Association of Law Enforcement Hypnotists. I have even served as President of the Association. Since 1981, the Association has met and, during these meetings, often discussed new material concerning hypnosis. I also reviewed training brochures on hypnosis periodically.

7. Once I was trained in hypnosis, I performed hypnosis for the Jacksonville Police Department and other law enforcement agencies. Before the *Jean* case, I performed hypnosis approximately 16-20 times in investigations. In addition to performing hypnosis for the Jacksonville Police Department, I performed hypnosis for

law enforcement agencies in Lenoir County, the City of Kinston, and for either Craven County or the City of New Bern.

8. On the afternoon of July 22, 1982, Detective Stephen Smith requested me to hypnotize Jacksonville Police officer James Shingleton in reference to the description of a suspect Officer Shingleton had stopped during the early morning hours of July 21, 1982, on Highway 24 in Jacksonville, North Carolina. I was informed that this suspect matched the description of an assailant who had committed rape and sexual assault nearby. I was informed that Officer Shingleton had reached the extent of his ability to recall identifying features of the suspect. From conversations with Detective Smith, I believed all other investigative methods concerning Officer Shingleton's identification of the suspect had been exhausted so I agreed to hypnotize Officer Shingleton.

9. During the hypnosis of Officer Shingleton, I followed the training I received to the best of my ability. Detective Smith told me he had completed a report of what Officer Shingleton had remembered so I believed this report served as the pre-hypnotic report of Defendant Shingleton's knowledge. Pursuant to my training, I tape recorded the session. I also completed a hypnosis work sheet. From talking with Detective Smith, I believed that all necessary information surrounding the hypnosis was recorded either by Detective Smith or was otherwise preserved on the audiotape. From these items, pre- and post-hypnotic memory can be obtained.

10. At all times, I acted in good faith and tried not to influence or implant memory into Officer Shingleton's

mind. I used the information he had already provided as the foundation and tried to probe him to unlock the memories of what he had seen. Pursuant to my training, I believed that his subconscious mind had recorded the entire incident and hypnosis was the catalyst to getting his conscious memory to remember the incident fully.

11. During the hypnosis, Officer Shingleton began remembering exact conversations he had with Jacksonville Police Dispatch. I certainly did not plant these memories into his consciousness. In fact, I did not implant any memory into his consciousness. I emerged from the hypnosis believing that he simply relaxed to the point where he remembered the events that occurred on July 21, 1982, in an environment free from the stresses and strains of outside influences. At trial, Officer Shingleton testified that he was *not* 100 percent sure that Mr. Jean was the person he saw during the early morning hours of July 21, 1982. At no time did hypnosis strengthen his memory to the point of fanatical certainty where such certainty did not otherwise exist.

12. On July 30, 1982, Mrs. Alice Kathleen Wilson consented to hypnosis upon the recommendation of Detective Smith. Mrs. Wilson had been the victim of a rape and sexual assault 9 days earlier. Mrs. Wilson had received medical treatment and, although she was upset by the rape when it occurred, she was calm before, during and after the hypnosis. She appeared to me to be willing and emotionally able to go through hypnosis. Before the hypnosis, she assured me that she was willing and emotionally able to go through hypnosis. She did not appear to me to be then in a current state of trauma.

13. I got permission from the Chief of Police to hypnotise [sic] Mrs. Wilson. I relied on the advice and consent of my superior officer to hypnotize Mrs. Wilson. At no time before, during or after the hypnosis did my opinion change as to her ability to go through hypnosis without emotional trauma. She was not then undergoing medical care, so there was no medical provider with whom I needed to consult before hypnotizing her. I had been assured by Detective Smith that she had reached the extent of her memory and that there were no other investigatory techniques available to restore her memory.

14. The main purpose of the hypnosis was to relax her and get her into a state of comfort and complete security so she would not fear harm from remembering the rape and assault. The last thing I wanted to do was to create a situation where she would, in effect, be raped all over again as if it was actually happening to her again and for her to face, in her mind, the threat of death. I wanted her to view the rape without experiencing it. I hoped that she would be able to view the rape and better describe the rapist. I based my questions upon the information she had provided. She had provided the factual/informational foundation on which I developed my questions. At no time did I intend, nor did I believe, I created false memories in her mind. I did the best I could under the circumstances faced with the uncertainties of the case and my knowledge of hypnosis at the time.

15. I inquired as to why a picture had made her feel sick. She had stated that the picture made her feel sick and I simply tried to unlock the subconscious basis for this memory. Again, she had laid a foundation upon which I formulated and asked questions. It could have

very well been that she would have remembered a situation involving a person unconnected with the rape who looked like the person in the picture. Such a circumstance would have cleared her memory and allowed her to focus upon the characteristics of the rapist, thus clearing the person in the picture. I was simply acting in good faith to get her to unlock the reasons why this picture made her feel sick. At no time did I act with the intent to cause her to identify incorrectly Mr. Jean as the assailant. In fact, I do not believe the hypnosis caused her to identify Mr. Jean incorrectly as her assailant. She subsequently picked his voice out of a voice exemplar and made a positive identification at a show-up based upon features not visible in the photograph in question.

16. After the hypnosis ended, I believed that it was not productive. In my opinion, it certainly did not create exculpatory evidence or evidence material to Mr. Jean's defense based upon my knowledge and understanding of the law concerning hypnosis as it existed in 1982. I thought all we had gained was that the assailant's accent was possibly Puerto Rican where we had known before that it was not southern United States. Also, the assailant's shoe laces, which can be changed by an [sic] person at anytime without anyone noticing, changed from white to black. This was not a reason to celebrate thinking that we had our man. I have attached a chart, which was prepared by Special Deputy Attorney General (now retired) Richard N. League that was used in the State of North Carolina's Brief to the Fourth Circuit during Mr. Jean's habeas corpus case. I adopt the statements as to her pre- and post-hypnotic memory as my own

because they accurately depict my knowledge and understanding of how the hypnosis session was not productive nor did it substantially alter or create in Mrs. Wilson [sic] memory that lead to Mr. Jean's conviction.

17. Before the *Jean* trial, I hypnotised [sic] Assistant District Attorney Walter Wayne Vatcher on a matter not relevant to the *Jean* case. I explained to him my methods and the documents and other recordings which are created as a result of hypnotizing a witness.

18. Assistant District Attorney Vatcher knew of the documents and recordings concerning the hypnosis of Officer Shingleton and Mrs. Wilson. I informed Assistant District Attorney Vatcher of my possession of these items and he acknowledged my possession of them. He never requested me to turn them over to him or to Mr. Jean's defense counsel.

19. At no time did I receive a copy of any discovery request, either oral or written, directing me to turn over items concerning the hypnosis to Mr. Jean's criminal defense counsel. If I had received such a request, I would have turned over the items to Assistant District Attorney Vatcher, as attorney for the State.

20. At no time did I intentionally withhold this evidence from Mr. Jean's criminal defense counsel.

21. I believed that the hypnoses performed in the *Jean* case revealed only *inculpatory* evidence. Because of this belief, it did not occur to me that I had a duty to bypass the District Attorney's Office and deliver these items directly to Mr. Jean's criminal defense counsel. Even with evidence material to the defense, I was trained

that my duty is to inform the District Attorney's Office of the evidence and turn it over to that Office when requested. I believe I would only have an obligation to bypass the District Attorney's Office and go directly to the trial judge or defense counsel if I perceived that the District Attorney's Office was withholding material or exculpatory evidence. I have never been involved in such a situation. Likewise, I have never known the Onslow County District Attorney's Office to perform such acts.

22. I never acted with malice, actual or implied, towards Mr. Jean.

23. I did not create the voice exemplar.

24. While I was present at the showup, I was not the lead investigator on the case.

25. I was not responsible and I did not participate in the making or the selection of the pictures of Mr. Jean and the other suspects shown to Mrs. Wilson.

26. At no time did I learn of evidence that negated probable cause to believe that Mr. Jean had committed the rape and sexual assault of Mrs. Wilson. At all times during the investigation in 1982, the evidence obtained progressively strengthened the case against Mr. Jean.

27. In 1995, it is easy to look back at a 1982 investigation and investigatory techniques with the benefit of more complete hindsight knowledge and make judgments as to what should or should not have been done, but I believe this ignores the practical realities and uncertainties involved in such a criminal investigation as it develops from day one. Decisions had to be made based

on the resources we had and using the investigatory techniques that the State of North Carolina taught.

28. At no time during the investigation did I or anyone in the Jacksonville Police Department who was known to me acquire additional information casting doubt upon Mr. Jean's guilt that was not made known at trial in front of the jury. At all times, I availed myself of information that was reasonably available to me and at all times, I believed Mr. Jean was guilty.

29. At no time in my career as a police officer has anyone ever trained me that I was responsible for deciding what evidence should be provided to a defense counsel in a criminal case in lieu of providing it to the District Attorney's Office. Likewise, I have never been trained that I am responsible for deciding what evidence will be presented at trial. At all times, I have been trained that the above-mentioned duties are the duties of the District Attorney's Office.

30. I was not at the trial of Lesly Jean.

Further Affiant saith naught.

/s/ Delma G. Collins
Delma G. Collins

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

I, Crystal D. Keel, a Notary Public in and for said County and State, do hereby certify that DELMA G. COLLINS personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 11 day of April, 1995.

/s/ Crystal D. Keel
Notary Public

My Commission Expires:

11/29/99

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* * * *

The minimal likely effect of hypnotism on the trial testimony of the witnesses is also starkly pointed up by comparisons of their pre-hypnotic descriptions, descriptions under hypnosis and at-trial descriptions of Petitioner. These show the descriptions were neither generally poor in content nor inaccurate overall, *United States v. Hughes*, 716 F.2d 234, 241 (4th Cir. 1983). In Ms. Wilson's case, there were apparently four pre-hypnosis descriptions within 24 hours of the crime – one at the scene, shortly after the intruder had gone; one later in the morning to the lead investigator; a handwritten statement about the same time; and one to the SBI on that afternoon for purposes of making the composite (App 340-342). A pre-hypnosis form also indicates some discussion of characteristics on July 30 (App 238). Five reports reflect these and Column 1 below is a combination of the described features from those reports[6]; the astericks [sic] in Column Two reflect the items Petitioner argues are new and suspect.

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[6] The descriptions in these reports and the testimony about them are set out individually at App 178-184 plus App 238.

Pre-Hypnosis Description From View from the Time of the Crime	Description During Hypnosis	At-Trial Recollection of View From the Time of the Crime
Black race		Dark skinned
5'8", 5'8"-6'?		5'8"
Light coloration (police officer); Dark coloration (SBI)		
160-170, 165-170, 180(?) lbs.		165 lbs.
Medium build/muscular		
Some accent	*Possibly Puerto Rican accent	"Smooth"/possibly Puerto Rican
Early 20's		
Short black hair, close cut Military – USMC, kinky		Short close cut, USMC Kinky hair
High-top white tennis shoes/ sneakers, Nike	*White high-top shoes with Nike emblem	White high-top Nike tennis with Nike swirl
White high-top crew socks	White socks	White, almost to knee, crew
Dark or blue running shorts	Dark shorts	Dark blue, like jogging shorts
Dark pull-over shirt	Dark shirt	Dark pullover shirt
	*White shoelaces	
Eyes not brillantly white, dark, not bright and sparkly, almond-shaped eyes close together	*Gray eyes/almond shape	Not bright, almond shape
	Ears don't stick out	
Square chin	Face shape same as photograph	Square face
		Eyebrows not bushy
High cheekbones		High cheekbones
Freckle ("looked like")		Mole/freckle on cheek
		No facial hair

As can be seen, the descriptions were largely the same throughout to the extent they cover the same things; the hypnotic session dealt with very few points of description; the only truly new memory from hypnosis was that the shoes had white laces, which was not recalled at trial.

Mr. Shingleton gave one description before hypnosis, to Detective Smith. Comparisons of his descriptions from App 185-186:

Pre-Hypnosis Description From View at Time of Interception	Description During Hypnosis	At-Trial Recollection of Description From the Time of Interception
Black	Black	Black
5'10"	5'10"	5'9" – 5'10"
170	*180	
		Jamaican accent
High-top tennis shoes	White high-top basketball shoes	White basketball type tennis shoes
	*White shoelaces	White shoelaces
White knee high socks	*Knee-high white socks with two 1-inch blue stripes	White
Blue shorts	*Blue elastic jogging shorts without stripe	Blue jogging shorts with white trim
Blue shirt with writing	*Blue short-sleeve pull-over with something dark on chest	Blue
Close cut hair	Short hair, no part	
Mustache	*Clean shaven	No Mustache, but testified that before hypnosis, suspect had a mustache.
	*Baby faced	
	Four-inch forehead	
	Thin eyebrows	
	*Glassy eyes	
	*Full cheeks	
	No moles or scars	
	*Big nose	
	*Oval jaw	Long face
	*Big lips/bottom lip larger	

Again, the characteristics marked with asterisks are those Petitioner contends show the dangers of hypnotism were present

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, JAMES SHINGLETON, Police Officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants	)	AFFIDAVIT OF JAMES SHINGLETON

1. I am James Shingleton and I am competent to make the statements contained herein based upon my personal knowledge.

2. I am currently a Detective with the Jacksonville, North Carolina Police Department. During July-December, 1982, I was a patrol officer with the Jacksonville Police Department.

3. During the early morning hours of July 21, 1982, I heard reports of a rape and sexual assault occurring at 104 Sherwood Drive in Jacksonville. Soon after hearing reports of the rape and sexual assault, I was travelling on Highway 24 near that location when I spotted a male

matching the description of the rapist walking beside of the road.

4. I turned on the blue lights of my patrol car and stopped. I told the male he was a suspect to a rape and that I wanted to ask him a few questions. I asked him to turn around and place his hands against my patrol car. By the light of both my patrol car's headlights and flashing blue lights, I could see him. He then fled into the nearby woods. I yelled for him to stop and drew my service pistol. I thought about shooting him, but did not do so because, pursuant to my training, I realized that I did not have probable cause to believe he was a dangerous fleeing felon. I immediately called for backup and attempted to find him. Other Jacksonville Police Officers and United State Marines Corps Military Police Officers responded to my call and assisted me in the unsuccessful search for him.

5. Over the course of the next 24-36 hours, I tried hard, probably too hard, to remember his exact description. I knew if I saw him again, I could identify him. Putting what I saw into words that could be understood for a sketched artist, however, was not possible at that time. I was stressed and tense.

6. After I had tried my best to remember everything and with no other investigatory techniques available to my knowledge, Detective Steve Smith asked me to undergo hypnosis. I had generally heard about hypnosis and believed it to be highly productive so I agreed to be hypnotized. I was not receiving any medical treatment nor did I feel it was medically unsafe for me to be hypnotised.

7. I believe that the hypnosis, conducted on July 21, 1982, was therapeutic in nature because it helped me to relax and remember events.

8. The clothing recovered from Mr. Jean's locker matched the clothing I saw him wearing on the morning of July 21, 1982 when I stopped him on Highway 24, just before he fled into the woods. No one in the Jacksonville Police Department, including Officer Collins, had seen the clothing in Mr. Jean's locker before I was hypnotised.

9. I am bewildered by the allegations that I withheld exculpatory or material evidence. If hypnosis was so drastic that it altered my memory as a witness to events I saw, it seems impossible to me that I should have been expected to realize that these memories, my memories, are not true and accurate. Back in 1982, hypnotically refreshed testimony was admitted in North Carolina's courts and believed by me and other law enforcement officials known to me to be highly effective.

10. On the night on July 26, 1982, I was called to the Dunkin Donuts near where the rape occurred and near where I had confronted the suspect who fled. I got out [sic] my patrol car, saw a man who turned out to be Lesly Jean, and immediately recognized him as the man who I saw on the Highway 24 just after the rape and sexual assault occurred. I identified him without hesitation and without having previously seen his photograph. When I later saw the clothing from his footlocker, I recognized it as being the clothing I saw on him on Highway 24 just after the rape occurred. Before I was hypnotized, I stated that I thought I could identify the person who I saw on

Highway 24 if I saw him again. I believe that my identification of Mr. Jean was based upon my pre-hypnotic memory. In any event, at no time did I act in bad faith to identify Mr. Jean while believing he was not the person who I encountered on Highway 24 just after the rape occurred.

11. I did not have the documents and recordings concerning my hypnosis or the hypnosis of Mrs. Wilson in my possession, custody, or control. I believed that Assistant District Attorney Walter Wayne Vatcher knew of the existence of the items and where they were stored. In 1982, the working relationship between the Jacksonville Police Department and the District Attorney's Office was a close one. The other officers who I observed and I worked well and were frank with Assistant District Attorney Vatcher about evidence believed to be exculpatory or otherwise material to the defense. No one I knew, including myself, wanted to carry around the guilt of sending an innocent person to jail as the result of failing to inform the District Attorney's Office of exculpatory or material evidence. Upon information and belief, Mr. Vatcher had discussions while I was present with him and with either Officer Collins or other members of the Department as to the existence of the items relating to the hypnoses and the other identification procedures used. I was never asked to turn these items over to Assistant District Attorney Vatcher or to Mr. Jean's defense counsel.

12. At no time did I receive a copy of any discovery request or an oral request directing me to turn over items concerning the hypnosis to Mr. Jean's criminal defense counsel. If I had received such a request, I would have notified Assistant District Attorney Vatcher, as attorney

for the State, of the fact that I did not have any such items and tried to direct him as to where he may obtain them. If I truly had believed that exculpatory or material evidence was being withheld from Mr. Jean's lawyers by any member of the Jacksonville Police Department or the District Attorney's office, I would have done the morally correct thing and informed the trial judge, the Honorable Herbert O. Phillips, III, or circumvented normal procedure and directly informed Mr. Jean's lawyers of the evidence.

13. Attached are portions of the transcript of my testimony at Mr. Jean's criminal trial. This testimony shows that I remembered the hypnosis and described *for the jury* how my description of the person I encountered changed as a result of the hypnosis. As reflected in that transcript, I believe my testimony showed to the jury that the questions asked me during the hypnosis were suggestive even though that was not the point I intended to make. Likewise, I do not believe the questions were suggestive, but were founded upon the facts known at that time. The jury had knowledge: that I was hypnotized; that my description of the person I encountered changed "a great deal" during the hypnosis; that I "found out" new identifying features during the hypnosis; and that I was not 100% sure that the person I encountered on Highway 24 was Mr. Jean, although I believed it was him. Since the State stipulated at trial that the partial prints from the general area of my patrol car where the person who I encountered had placed his hands did not match Mr. Jean's prints, the jury had evidence material to Mr. Jean's defense presented to it. In front of the jury, I freely admitted facts upon which the jury could have found that Mr. Jean was not the person who I stopped on Highway

24 just after the rape. In fact, based on the discrepancies in my testimony, which I obviously did not withhold from the jury, the jury could have easily found that a person other than Mr. Jean, who looked liked [sic] Mr. Jean and who matched the description of the rapist, was in the vicinity of the rape immediately after it occurred. I believe the evidence purportedly withheld could have done little more than my admission that the suspect's physical features changed and that "[m]y memory improved a great deal," both as a result of hypnosis. I freely admitted the point in front of the jury so that, in my opinion, the facts leading to this point were somewhat cumulative.

14. At no time did I intentionally withhold evidence from Mr. Jean's criminal defense counsel.

15. At all times, I had a good faith belief that the memories I had were genuine.

16. I never acted with malice, actual or implied, towards Mr. Jean.

17. I did not create the voice exemplar.

18. I was not present at the showup where Mrs. Wilson identified Lesly Jean as the rapist. I was not responsible for organizing or supervising the show-up. Detective Smith was the lead investigator. Likewise, I was not responsible and I did not participate in the making, selection, or showing to Mrs. Wilson of the pictures of Mr. Jean and the other suspects.

19. At no time did I learn of evidence that negated probable cause to believe that Mr. Jean had committed the rape and sexual assault of Mrs. Wilson.

20. In 1995, it is easy to look back at a 1982 investigation with knowledge gained in the interim and judge it harshly. This does not mean that every investigation in which I was involved to any degree is flawed, but just that with perfect knowledge, the right course of action becomes clearer and courses of action, which appeared wholly reasonable at the time, may no longer be reasonable because of subsequent learning and understanding. This is what I believe has happened with the *Jean* case. In 1982, we did not have the benefit of hindsight, but had to act according to what we believed was right at that time.

21. At no time in my career as a police officer have I been trained that I am responsible for deciding what evidence will be presented at trial or disclosed to a criminal defense counsel in response to legal discovery requests.

22. At no time during 1982 did I believe Assistant District Attorney Vatcher was doing anything wrong, but I am not a lawyer.

23. I did not sit at the prosecutor's table during the trial of Mr. Jean. I was in the courtroom, however, when Assistant District Attorney Vatcher held up a nightgown and asked Mrs. Wilson, who was on the witness stand, whether she was wearing the nightgown when she was raped and sexually assaulted. Immediately after Assistant District Attorney Vatcher asked Mrs. Wilson this question, Mr. Jean nodded affirmatively in full view of everyone, including the jury.

Further Affiant saith naught.

/s/ James Shingleton
James Shingleton

STATE OF NORTH Carolina
COUNTY OF ONSLOW

I, Crystal D. Keel, a Notary Public in and for said County and State, do hereby certify that JAMES SHINGLETON personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 11 day of April, 1995.

/s/ Crystal D. Keel
Notary Public

My Commission Expires:
11/29/99

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* * *

[p. 416] A I was with him approximately three or four hours.

Q I mean up until you released him to Detective Smith?

A Approximately 20 minutes, sir.

Q Thank you very much, sir.

MR. VATCHER: That's all I have.

COURT: Any cross examination?

MS. MOORE: Yes, your Honor.

COURT: Go ahead, please.

CROSS EXAMINATION by MS. MOORE:

Q Officer Shingleton, let's begin by going back to the highway – where was it, Highway 24?

A 24, yes, ma'am.

Q And you stated you turned around and headed east and you saw a black male on the right side of the road. Was it the right side or left side?

A It would be the right side. Initially, when I first observed him, I was going westbound. The subject was on the eastbound.

Q You stated this area was rather dark?

A Yes, ma'am.

Q And you had to use your headlights and blue lights to be able to see?

A No, ma'am. When I first stopped him, that's when I activated the blue lights. When I first observed him, he was coming up the hill towards the blinking light.

[p. 417] Q He stopped when you told him to stop, this person?

A Yes, ma'am.

Q And you began to question him about where he had been?

A Yes, ma'am.

Q Now, you stated that the person that you stopped told you that he had been to see some friends?

A He had been to a friend's house.

Q Did you try to search him at that time?

A No, ma'am, I did not.

Q Did you advise him that he was a suspect of any kind?

A After I put his hands on the hood of the car, yes, I did.

Q Now, what part of the car did you put his hands on?

A It was on the left front fender, right above the tire.

Q And you stated you had, another person had to put their hands on the car also?

A Yes, ma'am.

Q What is the purpose of having their hands on the car?

A When I talk to anybody, I like to make sure they don't have any weapons.

Q Isn't it also to get fingerprints if you need them?

A No, ma'am.

Q Isn't it to take fingerprints?

A No, ma'am, it's not standard procedure.

Q That's not standard?

A No.

[p. 418] Q On this particular evening, did anyone come out to take fingerprints off of the car?

A No, ma'am, not that evening.

Q When were the fingerprints taken off?

A I believe it was dusted for prints the following day.

Q The following day? And where was that?

A That was in back of the police department.

Q Were you present when that was done?

A Yes, ma'am.

Q And did you advise – who took the fingerprints?

A The evidence technician, Lieutenant Buchanon.

Q Lieutenant Buchanon? And did you advise Lieutenant Buchanon where the person had stood, the two people had stood?

A Yes, ma'am.

Q And he took both of the fingerprints as far as you know?

A As far as I know, the only thing he was able to secure off the vehicle was a partial palm print.

Q All right. You also stated that the person that you stopped was wearing some white tennis shoes?

A Yes, ma'am.

Q And they were hightops?

A Yes, ma'am.

Q Now, isn't it – is it unusual in the summertime for black males to wear high-top tennis shoes?

MR. VATCHER: Objection, your Honor.

[p. 419] COURT: Overruled.

Q If you know?

A No, ma'am.

Q And what about shorts and tops?

A No, ma'am, not when you're jogging.

Q So, most people wear these during the summer, do they not?

A Yes, ma'am.

Q The only distinctive feature that you are – about the person you stopped was, according to your testimony or according to what you were told, is that he was 5'9" or 5'10" and a black male?

A No, ma'am. Also that he had on blue shorts and T-shirt with white tennis shoes. That's the description that was given out.

Q So, you cannot positively say that those white tennis shoes or those blue and white shorts or that blue shirt belonged to the person you saw that night, can you?

A No, ma'am, not positively.

Q Now, you stated that they are similar in type?

A Yes, ma'am.

Q Now, you also stated that – well, let me ask you, were you hypnotized at any time concerning this particular case?

A Yes, ma'am, I was.

Q And who hypnotized you?

[p. 420] A Detective Captain Collins.

Q And when was that done?

A That was done on the 22nd.

Q The 22nd of July?

A Yes, ma'am.

Q And what happens when you're hypnotized?

A I don't really know other than you're asleep or your conscious or your subconscious goes to sleep and you [sic] subconscious takes over your thoughts.

Q What was said to you, if you know?

A He asked basic questions as to the physical description of the individual that I had stopped on Highway 24.

Q And what description did you give him at that time?

A Black male, approximately 5'9", wearing a blue shirt, blue shorts, white high-top tennis shoes, white socks, and I believe they had a blue stripe on the top of the white socks.

Q Now, do you recall what color shoe strings were in his shoes?

A No, ma'am.

Q Isn't it usual or usually white shoe strings in white tennis shoes?

MR. VATCHER: Objection, your Honor.

Q If you know?

COURT: Overruled.

A Usually you wear white laces with white tennis shoes, yes, [p. 421] ma'am.

Q So, wouldn't those black shoe strings be distinctive in your mind?

A Ordinarily, yes, ma'am. That's when you were looking for it.

Q So, you can't remember if there were black shoe strings in those tennis or not, can you?

A No, ma'am.

Q Now, let's go back to your hypnosis. Now, could you tell the Court and jury exactly what happens when you're hypnotized? That's what I need to know.

A Described in my own words? Detective Captain Collins asked several questions and in order for me to relax and kind of put me in a sleepy mood and very relaxed mood, and once I was there he asked several questions. And I described the instant from start to finish.

And the questions he did ask – or one particular question was, I believe, on the night that the incident

occurred, which was the 21st, that I imageined [sic] some type of design on the, this T-shirt, which under hypnosis we found out it was not a design, but which was instead sweat mark. Evidently the individual had been running or jogging.

Q Okay, what else?

A There were some discrepancies, I believe, on the initial identification of the assailant in that my physical description [p. 422] of his face was somewhat vague and under hypnosis there, the questions that I had – for instance, whether the individual I had, on the night in question, I thought he had a mustache, but under hypnosis we found out that he did not have a mustache.

Q Can you think of anything else that was, that changed under hypnosis?

A No, ma'am, that's the only thing that I can recall.

Q So, now, prior to being hypnotized you thought that the person you saw out on Highway 24 had a mustache?

A Yes, ma'am.

Q Was there any other distinctive factors that you noticed about the face of the person that you saw on Highway 24?

A I believe there was a discrepancy as far as the width of the nose.

Q And what was your idea of the width of the nose before the hypnosis?

A I don't remember, really recall what the whole discrepancy was.

Q Do you recall seeing any freckles on the person out on Highway 24?

A No, ma'am.

Q What about any black moles on the face?

A No, ma'am, none that I can recall.

Q Now, after the hypnosis, well, you stated that you thought [p. 423] you saw some marks of some kind of writing on the T-shirt?

A Yes. I thought I initially saw a design on the T-shirt.

Q Now that was your initial thinking, was it not?

A Yes, ma'am.

Q Now, I'm going to ask you if there is any type of design on this T-shirt, if you know?

A Other than the left sleeve, no, ma'am.

Q Do you see any sweat marks?

A No, ma'am.

Q And initially you thought that that person had a mustache?

A Yes, ma'am, initially.

Q Now, what made you change your mind except for being under hypnosis?

A Well, I wasn't really positive. I believe when I first give the man from SBI lab was doing the Identikit, I

believe I was kind of hesitant about portion of the individual's facial features. That was something I couldn't get right in my mind, whether he did or did not have a mustache. I thought he had a mustache.

Q And you really wanted to be sure?

A Yes, ma'am.

Q Now, after the hypnosis, though, you decided that this man didn't have a mustache?

A No, ma'am, he did not after the hypnosis. He did not have a mustache.

[p. 424] Q Or was it after you went to the Dunkin Donuts and saw the defendant at the Dunkin Donuts that you decided he didn't have a mustache?

A No, ma'am. I was hypnotized before I arrested the defendant at Dunkin Donuts.

Q Officer Shingleton, you were with the person at the, on Highway 24 approximately how long?

A Approximately a minute and a half to two minutes at the most.

Q So, you can't be positively sure that that person was this defendant, can you?

A Not absolutely sure, no, ma'am.

Q So, when you went to Dunkin Donuts, did you say that looks like the man or I'm positively sure that that's the man?

A No, ma'am. My statement was to my superviser that that is the man.

Q That is the man?

A Yes, ma'am.

Q And what makes you so sure that that is the man?

A That's the feeling I had from my encounter with the individual on the 21st, that the defendant is the subject I had the encounter with.

Q After seeing that person only one minute and one half?

A Yes, ma'am.

Q And were you standing face to face with him the whole, [p. 425] entire one minute and a half?

A Yes, ma'am.

Q What about when he had his hands on the car?

A Then I had a profile view of the subject at that time.

Q What was that profile view?

A Similar to the defendant here.

Q Can you describe it?

A The facial features. He had the long jaw, the ears, the size of the lips, upper and lower lips.

Q Did you write any of this down at that time or when you came back to the station? Did you take any notes about what you saw?

A No, ma'am, I didn't have time.

Q Did you take any notes about what you saw at any time prior to today?

A Yes, ma'am. I had some notes that I jotted down previously, on the night of the 21st, which was just my own physical description of the individual's clothing, where he had gone into the woods.

Q And when did you write that?

A That was after I came out of the woods across from – between 7:30 and quarter to 8.

Q What did those notes say, if you can remember?

A Just a black male, 5 foot 9, blue T-shirt, blue shorts, white tennis shoes.

[p. 426] Q Do you recall whether – what type white tennis shoes?

A They were just the hightop, similar to basketball shoes.

Q So, you don't know whether it had any black stripe or not, do you?

A No, ma'am.

MS. MOORE: I have no further questions of this witness.

COURT: Anything on redirect?

MR. VATCHER: Yes, sir, your Honor.

REDIRECT EXAMINATION by MR. VATCHER:

Q Patrolman Shingleton, as a result of the hypnosis, did your memory of the events improve or become worse?

A My memory improved a great deal, sir.

Q Now, you indicated to Miss Moore that you jotted down some initial notes on the 21st. Did those notes ever mention anything about facial hair?

A No, sir.

Q Thank you very much, sir.

MR. VATCHER: That's all I have, your Honor.

COURT: Thank you.

MS. MOORE: I would like to ask Officer Shingleton one more question.

RECROSS EXAMINATION: by MS. MOORE:

Q Do you happen to have those notes present?

A No, ma'am.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN, Plaintiff v. DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police officer with the City of Jacksonville, North Carolina, Police Department, Individually, Defendants	DECLARATION OF ALICE KATHLEEN WILSON (28 U.S.C. § 1746)

I, Alice Kathleen Wilson, pursuant to 28 U.S.C. § 1746 (1989), state as follows:

1. I am the person formerly known as Alice Kathleen Wilson. Since 1982, my name has changed and I, pursuant to Court order, am resuming the use of my former name to protect my identity from Lesly Jean. I am competent to make the statements contained herein based upon my personal knowledge.

2. On July 21, 1982, I awoke during the early morning hours by a man who raped and otherwise sexually assaulted me. The accounts of this incident have already been recorded and do not need repeating here.

3. When I was calm and days after having needed and received medical treatment so that hypnotizing was not a risk to me, Officer Delma Collins of the Jacksonville Police Department hypnotized me. Because I was hypnotized, Mr. Lesly Jean was freed and has now filed a lawsuit alleging that another person who was also hypnotized, Officer James Shingleton, and Officer Collins withheld exculpatory evidence from the prosecutor and Mr. Jean's criminal defense lawyers. This is not true because approximately one week before trial, the prosecutor, Assistant District Attorney Walter Wayne Vatcher, and I discussed the case in great detail. We specifically discussed the procedures used in my identification of Lesly Jean as the assailant and the hypnoses of Officer Shingleton and me. During this conversation, we also discussed the fact that my hypnosis had been tape recorded. The prosecutor appeared to me to be highly knowledgeable about the identification procedures, hypnoses and other investigative methods used by the Jacksonville Police Department.

4. I want to try to set the record straight for this honorable Court. Mr. Jean got out of jail because I, the sole witness to the rape and assault, cannot now testify at a criminal trial in a North Carolina State Court as to the identification of the man who raped me, Lesly Jean. I cannot testify at a criminal trial because I was hypnotized. This fact does not mean that Lesly Jean is innocent of raping me. He is not innocent.

5. I want the Court to know that I was hypnotized, not rendered brain injured. I remember what occurred during the hypnosis and how my memory changed as to some details. I also know what I saw the night I was

raped and assaulted. I can differentiate between the two. When I identified Lesly Jean as the rapist I was remembering facts from during the rape and assault, which was before I was hypnotized. My basis for identifying Lesly Jean was not compromised by the hypnosis. I had seen Lesly Jean's face clearly during the time he was in my bedroom because a light was on in my kitchen. When the attack first began, however, I was shocked and petrified with fear. At first, I tried not to look at him so that he would not think I could later identify him. I thought that if he thought I could identify him, then he would kill me. Because of this and because I was also extremely scared, I, at first, could not tell whether he was black or just very dark until he told me so. After he told me and over the remaining course of the hour and fifteen minutes he was in my bedroom, I began to take notice of his features. From previously living in San Diego, I remembered a television show I had seen which told of what to do if raped and how to try to remember identifying features of the rapist. Even so, after having gone through such a horrible experience, I was not capable of putting everything I saw into words. However, I knew what I saw. I knew that if I ever saw him again in person, I could identify him. I underwent hypnosis simply to assist in the investigation. I assure this Court that my identification of Lesly Jean was not based upon the hypnosis. In just several paragraphs, the Complaint attempts to selectively state and alter events occurring over many days and to create uncertainties as to my identification of Lesly Jean. It is true that given the magnitude of the charges and the two-dimensional, black and white photographs I saw, which failed to capture all of his identifying physical

10. From everything I observed, Officers Collins and Shingleton, as well as the other members of the Jacksonville Police Department who investigated the rape and assault, acted in good faith to capture the man who actually raped and assaulted me. In fact, from my contact with the Jacksonville Police Department, Officer Collins participated very little in the investigation and Officer Shingleton participated even less. I mainly thought of Officer Shingleton as another witness in the case whose participation was limited to seeing a person who matched the general description of the rapist a short time after the rape. The Jacksonville Police Department appeared to me to be fair and non-biased towards all suspects and potential suspects. In fact, they appeared to me to be almost too cautious in protecting the rights of the suspects, especially Lesly Jean.

11. While I was testifying at Lesly Jean's criminal trial in 1982, the prosecutor showed me a nightgown and asked me if it was the nightgown I was wearing when I was raped and assaulted. Immediately after the prosecutor asked me this question, I saw Lesly Jean nod affirmatively. He was in full view of the jury when this occurred.

12. Let Lesly Jean deny that he flunked a polygraph test in 1982 as to his innocence. Unless he is willing to commit perjury, he cannot make such a denial to this Court.

13. After the jury convicted Lesly Jean, the Court allowed him to make a statement. While he was making this statement, I understood him to be trying to explain why he was not on base when the rape and assault occurred. He, and other marines, had testified during

trial that he had been in bed on base when the rape and assault occurred.

Further Declarant saith naught.

I, Alice Kathleen Wilson, am executing this Declaration within the United States, and declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 31st day of March, 1995.

/s/ Alice Kathleen Wilson
Alice Kathleen Wilson

features, my identification of Lesly Jean may have appeared tentative to the Police at first. However, I did pick out his picture and, when I returned to the police station again before I was hypnotized, I was ready to identify his picture again. I was certain of his identity before I was hypnotized. I did not communicate my readiness clearly enough, but after the hypnosis, I selected his picture from among the others, just as I could have done and was ready to do before the hypnosis. Also, I never said Lesly Jean had a mole as big as a dime as the Complaint alleges. The composite, created after the rape and before the hypnosis, shows that the mole was not that large. After having been raped, I was trying as best I could to communicate that his complexion looked uneven where the mole was located, which was caused by a mole.

6. Based on my memory before I was hypnotized, I am sure that Lesly Jean was in my bedroom for approximately one hour and fifteen minutes and close to me for an hour of that time. Also, without knowing it was his voice at the time and without being hypnotized as to it, I identified Lesly Jean's voice as the person who raped and sexually assaulted me out of five other voices, which I thought were otherwise similar. Before I was hypnotized, I identified his accent as not being southern United States and as possibly being a Puerto-Rican from New York. I have not been exposed to many types of caribbean accents so pinpointing it as creole or Haitian was not possible for me then, anymore than it would be for me now to pick out a South American or Asian accent and name the specific country of origin.

7. Once I saw Lesly Jean in person, a flood of pre-hypnotic memories hit me. I saw identifying features that

the two dimensional photographs did not capture and that I had not sufficiently put into words before that time. In addition to other identifying characteristics, Lesly Jean's profile and the shape of his torso left no doubt in my mind he was the man who raped me. Plain and simply, I identified him by his total physical identifying features. I knew Lesly Jean was the man who raped me when his total identifying characteristics hit me in a wave of horror. After the lineup, I [sic] took me a few minutes to steady myself. The police could have had anyone else there standing with him when I viewed the line-up, and, in fact they did have two black men who I thought otherwise matched his description standing next to him, but my eyes cut straight through to him. He and I both know what occurred on July 21, 1982. He knows that I identified him based on the fact that he was in my bedroom on that date and not because I was hypnotized to believe he was the rapist.

8. Based on my being raped and assaulted, and being with him for over an hour, I will never forget him. I believe I would remember Lesly Jean and could identify him once I saw him in person even if I had been hypnotized for hours on end to *forget* him. I believe there are just some memories that are so deep that no amount of hypnotizing or time can substantially change them. I remember what occurred during the hypnosis in which I participated and it certainly did not change my memories from someone else to Lesly Jean.

9. I remember the man who raped me. That man is Lesly Jean. I pray unto this Court not to allow him to be, in essence, compensated for raping and assaulting me.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

CIVIL ACTION FILE NO.: 4:94-CV-62-H2

LESLY JEAN,
Plaintiff

v.

DELMA COLLINS, Chief of Detectives of the City of Jacksonville, North Carolina, Individually, and JAMES SHINGLETON, Police Officer with the City of Jacksonville North Carolina, Police Department, Individually,
Defendants

AFFIDAVIT OF WALTER WAYNE VATCHER

---

1. I am Walter Wayne Vatcher and I am competent to make the statements contained herein based upon my personal knowledge.

2. From 1979 to 1984, I was an Assistant District Attorney for Onslow County, North Carolina.

3. In 1982, I prosecuted Mr. Lesly Jean on charges of first-degree rape and sexual assault.

4. The District Attorney for the Fourth Prosecutorial District of North Carolina, the Honorable William H. Andrews, assigned Mr. Jean's criminal case to me. Pursuant to N.C. GEN. STAT. sect. 7A, -63, I had previously taken an oath of office and could perform the same duties of the District Attorney's when assigned by him to perform those duties. Because of the assignment of duties

from the District Attorney to me in Mr. Jean's criminal case, the North Carolina Constitution, Article IV, section 18, provided that I was "responsible for the prosecution on behalf of the State. . . . "

5. I, not Officer Delma Collins or Officer James Shingleton, performed the constitutional duties of the District Attorney for the Fourth Prosecutorial District of North Carolina on behalf of the District Attorney.

6. In Mr. Jean's criminal cases, I performed the duties of a prosecutor to the best of my ability. At all times, I acted in good faith. At no time did I step beyond my duties as a prosecutor. For the prosecution of Mr. Jean, and any acts or omissions incidental thereto, I claim prosecutorial immunity to the fullest extent allowed by the law.

7. I have had occasion to read the Complaint of Mr. Jean filed in the above-captioned action. To the best of my knowledge Officer Collins and Shingleton never withheld or suppressed any evidence. While I was acting in my prosecutorial capacity in regard to the criminal prosecution of Mr. Jean, one or both of these Officers informed me of the existence of the hypnoses and identification procedures mentioned in the Complaint. This was done months before trial during the Summer of 1982. During this same time period, the Jacksonville Police also advised me of the existence of the other evidence that Mr. Jean alleged in his Complaint was withheld from me, which included the sequence of facts and identification procedures used leading to the rape victim's identification of Mr. Jean. On one or more occasions, including one

occasion around the end of August or first part of September of 1982, I reviewed reports concerning evidence examined by the State Bureau of Investigation's crime laboratory. During this time and on many other occasions before the trial of Mr. Jean, I had discussions concerning the physical evidence and identification procedures that Mr. Jean alleges was withheld from me.

8. In 1982, an excellent working relationship existed between the Jacksonville Police and the District Attorney's Office on matters pertaining to criminal investigations and evidence establishing or defeating probable cause.

9. In executing my discretion as a prosecutor to seek an indictment and try Mr. Jean, I had to have and did, in fact, receive complete updates on the investigation, including facts concerning the identification procedures used. The Jacksonville Police were frank with me concerning the pros and cons of the case against Mr. Jean because, based upon my perceptions of them, they did not wish to see an innocent person convicted, which necessarily means that a guilty person remains free.

10. In my opinion, the identification procedures used were not impermissibly suggestive. They were not otherwise exculpatory or material to Mr. Jean's defense.

11. No one rushed to arrest Mr. Jean to quell public concerns over an at-large rapist. We waited, not because the evidence made Mr. Jean appear innocent, but because we wanted to make sure he was the rapist. As facts were uncovered during the investigation, the case against Mr. Jean became stronger, not weaker.

12. On one occasion during this time frame, Officer Collins even hypnotized me on a subject unrelated to the case. I did not request Collins to testify or produce documents. Based on my professional judgment, I believed that the hypnoses did not contain exculpatory information. I produced all information I felt was required by law.

13. Mr. Jean's criminal defense counsel learned of the hypnoses of the rape victim and Officer Shingleton on *voir dire* on Defendant Jean's Motion to Suppress Identification, which occurred before the witnesses testified at trial. In front of the jury, Mr. Jean's criminal defense counsel cross examined the rape victim on the fact that she had been hypnotized. (*See* Exhibit A). She remembered being hypnotized and the questions asked.

14. Mr. Jean's criminal defense counsel also cross examined Officer Shingleton on the fact that he had been hypnotized. Officer Shingleton testified as to how he was hypnotized and the questions asked. (*See* Exhibit B). He remembered what occurred during the hypnosis and how his description of the person he encountered changed as a result of the hypnosis. All of this testimony was given by him in full presence of the jury.

15. Officer Collins was available to testify, but Mr. Jean's criminal defense counsel did not call him to testify as to the procedures used. Mr. Jean's counsel did not request a *voir dire* on what his testimony would be concerning the methods he used to hypnotize the victim and Officer Shingleton.

16. Officers Shingleton and Collins turned over all evidence that I requested from them. I knew of the existence of the hypnoses having been conducted. I received a lengthy document from Mr. Jean's criminal defense counsel containing numerous discovery requests. The discovery did not name items concerning hypnosis by name. I turned over all the items I was compelled to do under the law at that time.

17. At no time did I act with the intent to withhold or suppress any exculpatory evidence or convict Mr. Jean improperly, nor am I aware of any other person withholding or suppressing evidence. It is my opinion that the evidence produced by the police department in 1982 was sufficient for a finding of probable cause, a trial and a conviction.

18. By filing this Affidavit, I do not waive the absolute immunity afforded to me for my acts as a prosecutor. Further I do not waive the other immunities that may be available to me, which may include qualified immunity, governmental immunity or otherwise. Further affiant saith naught.

/s/ Walter Wayne Vatcher
Walter Wayne Vatcher

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

I Lisa D. Hawkins, a Notary Public in and for said County and State, do hereby certify that WALTER WAYNE VATCHER personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal, this the 31 day of March [LDH] 1995.

[SEAL]

/s/ Lisa D. Hawkins
Notary Public

My Commission Expires:

2/3/97

EXHIBIT A

* * *

[p. 285] I saw him at the fire station, his face, I knew him immediately, who he was and the profile and details of his face.

Q And so on the 17th of December, 1982 –

A September.

Q 17th of September, 1982, you became 100 percent positive? That that was the man, Mrs. Wilson?

A Sir, I hadn't been able to see him in person up to this time. When I saw him in person, yes, sir, I knew who he was.

Q Okay. So on the 17th of December, that's when you became 100 percent positive, isn't that correct, ma'am?

A Sir, that's when I made my identification of him, yes, sir.

Q And are you today 100 percent positive that he was the assailant?

A Yes, sir.

Q And are testifying today that your testimony was not influenced by either the pictures, anything or anyone?

A That's right, sir.

Q That this was based solely on your memory?

A Yes, sir.

Q Mrs. Wilson, do you recall if you've ever been subjected to hypnosis?

A Yes, sir.

Q Do you recall what date that was?

A No, sir.

[p. 286] Q Do you recall who did it?

A Yes, sir.

Q Who was it?

A Detective Collins.

Q And do you recall what month it occurred in?

A No, sir.

Q You don't recall whether it was September or August?

A No, sir, I don't remember if it was July or August. It was either the end of July or beginning of August.

Q And you were hypnotized by Detective Collins?

A Yes, sir.

Q You have any idea what took place or what was said to you?

A Yes, sir.

Q While you were in the hypnotic state?

A Yes, sir.

Q In other words, you were conscious?

A Yes, sir.

Q And yet you were hypnotized?

A Yes, sir.

Q And that in no way influenced your testimony at all?

A No, sir.

Q And that in no way made you positively identify an individual?

A No, sir.

Q And you were positive on your own that this is the man?

[p. 287] A Yes, sir.

Q Then why may I ask, Mrs. Wilson, did you subject yourself to hypnosis if you were so sure?

A Would you please repeat that question?

Q Yes, ma'am. If you did everything on your own, as you're certain, ma'am, you were not influenced by

anything or anyone, why would you subject yourself to hypnosis, ma'am.

A They asked me to go under hypnosis to see if I could remember anything more about the picture that bothered me so much, and I didn't remember any more about it under hypnosis than I do normally. I remembered anyway and that's it.

Q How did you know the results of the hypnosis?

A Because I know what was said during the hypnosis. You don't not remember what was said. You know what's said to you during that time.

Q Were you not placed in a state of unconsciousness at that time?

A No, sir.

Q You were conscious and understood each and ever word that was said to you and what you said back?

A Yes, sir.

Q And you gained nothing from that hypnosis?

A No, sir.

Q Except perhaps the identity –

A No, sir.

[p. 288] Q – of the picture that made you feel ill?

A No, sir.

Q Mrs. Wilson, would your testimony here today be influenced at all by a desire to avenge a crime?

A No, sir.

Q What about would it be influenced by a desire to exact vengeance on someone you believe is guilty based on laboratory reports and anything anyone else told you?

A No, sir.

Q So, as you sit here now, you have no doubt in your mind that Lesly Jean does not have a twin, does not have anybody that looks like him, that he's the one?

A That's right, sir. I have no doubt in my mind that that was the man that raped me.

Q No possibility for error or excuse?

A That's right, sir.

Q And certainly no desire, either consciously or unconsciously, to support an identification made by someone else?

A No, sir.

MR. WRIGHT: I have no further questions, your Honor.

THE COURT: Anything on redirect by the State?

MR. VATCHER: Yes, sir, your Honor.

REDIRECT EXAMINATION by MR. VATCHER:

Q Kathy, you testified that the object was placed to your head while you were in your bedroom on the 21st of July, that

* * *

EXHIBIT B

* * *

[p. 419] COURT: Overruled.

Q If you know?

A No, ma'am.

Q And what about shorts and tops?

A No, ma'am, not when you're jogging.

Q So, most people wear these during the summer, do they not?

A Yes, ma'am.

Q The only distinctive feature that you are – about the person you stopped was, according to your testimony or according to what you were told, is that he was 5' 9" or 5' 10" and a black male?

A No, ma'am. Also that he had on blue shorts and T-shirt with white tennis shoes. That's the description that was given out.

Q So, you cannot positively say that those white tennis shoes or those blue and white shorts or that blue shirt belonged to the person you saw that night, can you?

A No, ma'am, not positively.

Q Now, you stated that they are similar in type?

A Yes, ma'am.

Q Now, you also stated that – well, let me ask you, were you hypnotized at any time concerning this particular case?

A Yes, ma'am, I was.

Q And who hypnotized you?

[p. 420] A Detective Captain Collins.

Q And when was that done?

A That was done on the 22nd.

Q The 22nd of July?

A Yes, ma'am.

Q And what happens when you're hypnotized?

A I don't really know other than you're asleep or your conscious or your subconscious goes to sleep and you [sic] subconscious takes over your thoughts.

Q What was said to you, if you know?

A He asked basic questions as to the physical description of the individual that I had stopped on Highway 24.

Q And what description did you give him at that time?

A Black male, approximately 5' 9", wearing a blue shirt, blue shorts, white high-top tennis shoes, white socks, and I believe they had a blue stripe on the top of the white socks.

Q Now, do you recall what color shoe strings were in his shoes?

A No, ma'am.

Q Isn't it usual or usually white shoe strings in white tennis shoes?

MR. VATCHER: Objection, your Honor.

Q If you know?

COURT: Overruled.

A Usually you wear white laces with white tennis shoes, yes, [p. 421] ma'am.

Q So, wouldn't those black shoe strings be distinctive in your mind?

A Ordinarily, yes, ma'am. That's when you were looking for it.

Q So, you can't remember if there were black shoe strings in those tennis or not, can you?

A No, ma'am.

Q Now, let's go back to your hypnosis. Now, could you tell the Court and jury exactly what happens when you're hypnotized? That's what I need to know.

A Described in my own words? Detective Captain Collins asked several questions and in order for me to relax and kind of put me in a sleepy mood and very relaxed mood, and once I was there he asked several questions. And I described the instant from start to finish.

And the questions he did ask – or one particular question was, I believe, on the night that the incident occurred, which was the 21st, that I imageined [sic] some type of design on the, this T-shirt, which under hypnosis we found out it was not a design, but which was instead sweat mark. Evidently the individual had been running or jogging.

Q Okay, what else?

A There were some discrepancies, I believe, on the initial identification of the assailant in that my physical description [p. 422] of his face was somewhat vague and under hypnosis there, the questions that I had – for instance, whether the individual I had, on the night in question, I thought he had a mustache, but under hypnosis we found out that he did not have a mustache.

Q Can you think of anything else that was, that changed under hypnosis?

A No, ma'am, that's the only thing that I can recall.

Q So, now, prior to being hypnotized you thought that the person you saw out on Highway 24 had a mustache?

A Yes, ma'am.

Q Was there any other distinctive factors that you noticed about the face of the person that you saw on Highway 24?

A I believe there was a discrepancy as far as the width of the nose.

Q And what was your idea of the width of the nose before the hypnosis?

A I don't remember, really recall what the whole discrepancy was.

Q Do you recall seeing any freckles on the person out on Highway 24?

A No, ma'am.

Q What about any black moles on the face?

A No, ma'am, none that I can recall.

Q Now, after the hypnosis, well, you stated that you thought [p. 423] you saw some marks or some kind of writing on the T-shirt?

A Yes. I thought I initially saw a design on the T [illegible]rt.

Q Now that was your initial thinking, was it not?

A Yes, ma'am.

Q Now, I'm going to ask you if there is any type of design on this T-shirt, if you know?

A Other than the left sleeve, no, ma'am.

Q Do you see any sweat marks?

A No, ma'am.

Q And initially you thought that that person had a mustache?

A Yes, ma'am, initially.

Q Now, what made you change your mind except for being under hypnosis?

A Well, I wasn't really positive. I believe when I first give the man from SBI lab was doing the Identikit, I believe I was kind of hesitant about portion of the individual's facial features. That was something I couldn't get right in my mind, whether he did or did not have a mustache. I thought he had a mustache.

Q And you really wanted to be sure?

A Yes, ma'am.

Q Now, after the hypnosis, though, you decided that this man didn't have a mustache?

A No, ma'am he did not after the hypnosis. He did not have a mustache.

[p. 424] Q Or was it after you went to the Dunkin Donuts and saw the defendant at the Dunkin Donuts that you decided he didn't have a mustache?

A No, ma'am. I was hypnotized before I arrested the defendant at Dunkin Donuts.

Q Officer Shingleton, you were with the person at the, on Highway 24 approximately how long?

A Approximately a minute and a half to two minutes at the most.

Q So, you can't be positively sure that that person was this defendant, can you?

A Not absolutely sure, no, ma'am.

Q So, when you went to Dunkin Donuts, did you say that looks like the man or I'm positively sure that that's the man?

A No, ma'am. My statement was to my supervisor that that is the man.

Q That is the man?

A Yes, ma'am.

Q And what makes you so sure that that is the man?

A That's the feeling I had from my encounter with the individual on the 21st, that the defendant is the subject I had the encounter with.

Q After seeing that person only one minute and one half?

A Yes, ma'am.

Q And were you standing face to face with him the whole, [p. 425] entire one minute and a half?

A Yes, ma'am.

Q What about when he had his hands on the car?

A Then I had a profile view of the subject at that time.

Q What was that profile view?

A Similar to the defendant here.

Q Can you describe it?

A The facial features. He had the long jaw, the ears, the size of the lips, upper and lower lips.

Q Did you write any of this down at that time or when you came back to the station? Did you take any notes about what you saw?

A No, ma'am, I didn't have time.

Q Did you take any notes about what you saw at any time prior to today?

A Yes, ma'am. I had some notes that I jotted down previously, on the night of the 21st, which was just my own physical description of the individual's clothing, where he had gone into the woods.

Q And when did you write that?

A That was after I came out of the woods across from – between 7:30 and quarter to 8.

Q What did those notes say, if you can remember?

A Just a black male, 5 foot 9, blue T-shirt, blue shorts, white tennis shoes.

[p. 426] Q Do you recall whether – what type white tennis shoes?

A They were just the hightop, similar to basketball shoes.

Q So, you don't know whether it had any black stripe or not, do you?

A No, ma'am.

MS. MOORE: I have no further questions of this witness.

COURT: Anything on redirect?

MR. VATCHER: Yes, sir, your Honor.

REDIRECT EXAMINATION by MR. VATCHER:

Q Patrolman Shingleton, as a result of the hypnosis, did your memory of the events improve or become worse?

A My memory improved a great deal, sir.

Q Now, you indicated to Miss Moore that you jotted down some initial notes on the 21st. Did those notes ever mention anything about facial hair?

A No, sir.

Q Thank you, very much, sir.

MR. VATCHER: That's all I have, your Honor.

COURT: Thank you.

MS. MOORE: I would like to ask Officer Shingleton one more question.

RECROSS EXAMINATION by MS. MOORE:

Q Do you happen to have those notes present?

A No, ma'am. [p. 427] So I wouldn't know whether it had any mention of hair or not, would I?

MR. VATCHER: Objection.

COURT: Overruled.

A No.

Q Thank you.

COURT: Thank you Officer Shingleton, you can have a seat.

Next witness ready now, sir?

MR. VATCHER: Yes, sir, she is.

COURT: Let your witness come up.

MR. VATCHER: Joan [sic] P. Medlin, your Honor.

JONA P. MEDLIN, being first duly sworn, testified as follows during DIRECT EXAMINATION by MR. VATCHER:

Q Please state your name and occupation For the Court and jury?

A Jona P. Medlin. I'm a forensic serologist employed by the State Bureau of Investigation.

MS. MOORE: I'm sorry, I missed the first name.

MR. VATCHER: Could you spell that, please?

A J-o-n-a.

Q And what are your duties with the State Bureau of Investigation, Mrs. Medlin?

A I'm a forensic serologist.

Q Would you define that for the jury?

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